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The New Swiss Prospectus Regime

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In June 2018 the Swiss Federal Parliament passed the Financial Services Act and the Financial Institutions Act, and on 6 November 2019 the Swiss Federal Council published the implementing ordinances thereto. The acts and the related ordinances will become effective on 1 January 2020. Modeled largely after the EU prospectus framework, the new prospectus regime marks a veritable paradigm change to Swiss capital market regulation, introducing a number of novelties for issuers of securities in the Swiss market, such as the requirement for an *ex ante* approval for most financial instruments, coupled with some important long-awaited explicit exemptions from such requirement and the requirement for a prospectus for secondary public offerings.

By Christian Rehm / René Bösch

In CapLaw 2018-56 we published an article on this topic which was then based on the final version of the FinSA, but only on the then draft of the FinSO. The following provides an updated version now reflecting the final version of the FinSO. No significant changes or amendments have been made to the text relating to the new prospectus regime, other than reflecting the definitive date of entry into force, the slightly changed transitional period, and reflecting the changed concept to avoid the classification of a debt issuance as deposit taking (see section 4 f). For readers' ease of reference and for the sake of easier access, we provide the full version of the updated article herein below.

1) The Proposed Revision of the Swiss Prospectus Regime

On 15 June 2018, after almost 2 ½ years of deliberation the Swiss Parliament enacted the Financial Services Act (FinSA) and the Financial Institutions Act (FIA). The FinSA sets forth the new prerequisites for providing financial services, as well as requirements applicable to offerings of financial instruments. As far as the rules on the offerings of financial instruments are concerned, the FinSA introduces a number of fundamental changes to the Swiss prospectus regime. Most notably, a requirement for an *ex ante* approval of prospectuses, the long-awaited codification of private placement exemptions in line with international standards and a duty to publish a prospectus in the case of secondary public offerings.

The Ordinance on Financial Services published on 6 November 2019 (FinSO) specifies several details implementing the principles set out in FinSA.

2) Duty to Publish an Approved Prospectus

a) New Approval Requirement

The "old" Swiss prospectus regime requires the publication of a rather short offering prospectus in the case of primary public offerings, but not for secondary offerings, and of a listing prospectus which is in line with international standards in the case of a listing on a Swiss stock exchange. It does not currently require offering prospectuses to be filed with, or approved by, any Swiss governmental or other authority or body. Only in the case of a listing of financial instruments in Switzerland, *e.g.*, on the SIX Swiss Exchange Ltd. (SIX), is such an approval required by the relevant stock exchange as the competent self-regulatory body.

The FinSA introduces an approval requirement for offering prospectuses by a new regulatory body, the so-called approval authority or reviewing body. This body, while still a private body, must be licensed by the Swiss Financial Supervisory Authority FINMA and will be vested with administrative powers. According to its media release of 22 November 2019, the SIX applied to be appointed as approval authority. In addition, it is expected that BX Swiss will also apply. Once licensed these approval bodies will be the sole competent bodies to approve prospectuses under the FinSA regime. Admissions of new issues to marketplaces, however, will continue to be governed by the admissions bodies of the relevant marketplaces. But the new framework should assure that such admission bodies have to accept an approved prospectus under FinSA without setting up its own additional disclosure requirements, aside from technical aspects relevant to the specific market place. It is expected that Swiss market places will amend their rules such that the approval and admission-to-trading process can run in parallel and be coordinated.

This prospectus and approval requirement will apply to all public offerings, primary and secondary, in Switzerland and, independently, to all securities that are to be admitted to trading on a trading platform in Switzerland. Securities that are publicly offered or are the subject of a request for admission to trading, in each case filed prior to the entry into effect of the FinSA, will benefit from a transitional period. According to the FinSO the duty to prepare a prospectus under the authority of FinSA comes into effect 6 months after the first approval authority is licensed, but not earlier than 1 October 2020.

b) Ex Ante Approval and Exemptions

In principle, the approval authority will have to approve the prospectus *prior* to a public offering or an admission of securities to trading on a trading platform in Switzerland. First-time issuers (*i.e.*, issuers who either have not yet published a prospectus approved by the approval authority or do not have securities admitted on a Swiss trading platform) will be required to submit the prospectus for approval at least 20 calendar days prior to commencement of the envisaged offering or admission to trading, all other

issuers at least 10 calendar days. These are the periods within which the approval authority would have to state that the prospectus is approved or that the prospectus has to be revised, in which case the applicable period for approval would start anew after re-submission. Yet, if the approval authority does not react within the required period, this does not mean that the prospectus is automatically deemed approved.

However, other than the European bond markets which are to a large extent wholesale markets targeted at institutional clients, the Swiss fixed income market is largely a retail market with standard denominations of CHF 5,000. This would mean that in a system requiring the pre-approval of prospectuses, bond issuers would always have to prepare a full-fledged prospectus prior to listing; in particular, for many issuers the Swiss market is not deep enough to warrant the preparation of a program documentation. This dilemma between having to obtain a pre-approval, on the one hand, and the issuers' need to be able to very quickly access the markets, on the other hand, has in the past been solved by the SIX by allowing the provisional admission to trading before the formal listing approval is obtained, but only for fixed income and structured products. Acknowledging the relevance of this practice for the Swiss market, FinSA now introduces an exception to the rule of *ex ante* approval for certain securities to be specified in the implementing ordinance. The FinSO names straight bonds, convertible and exchangeable bonds, bonds with warrants attached, mandatory convertible notes, contingent convertible notes (CoCos) and write-down bonds as such exempt securities, and structured products with a duration of 30 or more days.

Where this exemption applies, issuers must nonetheless ensure that the most important information about the issuer and the securities which are relevant for investors' decisions is available or can be made available no later than the day on which the public offering commences or admission to trading is applied for. The review and approval of the corresponding prospectus by the approval authority will, however, only take place *ex post* (*i.e.,* after the offering has been completed or after the admission to trading) rather than *ex ante*. But to benefit from this exemption from the *ex ante* approval requirement, a Swiss bank or broker dealer will have to *confirm* in writing to the issuer / offeror that the most important information about the issuer and the relevant securities is available at the time the prospectus is published. Prospectuses made available on the offering date or date of admission to trading but not yet approved will be required to contain a statement that it has not yet been approved by an approval authority.

c) Automatic Approval of Certain Non-Swiss Prospectuses

Another important feature of the FinSA is that foreign prospectuses qualify for approval by the approval authority if they are drafted according to standards of the International Organization of Securities Commissions (IOSCO) and the disclosure and ongoing reporting duties are equivalent to those of the FinSA. Prospectuses that have been approved in accordance with certain foreign standards to be specified by the approval authority will be automatically deemed approved.

A foreign prospectus automatically deemed approved must be published no later than at the time of commencement of the public offering or admission to trading and be deposited with the approval authority.

d) Publication and Validity of Prospectuses

In case of an initial public offering of equity securities, the approved prospectus must be published at least six business days prior to the end of the subscription period. This introduces a new statutory requirement for the length of the subscription period and will make discussions in the Swiss equity markets about the minimum duration of the subscription period obsolete. For the offering of non-equity securities, the approved prospectus must be published prior to the start of the public offering or before the admission of the security to trading. The publication may be made by electronic means only (*e.g.*, on the website of the issuer or guarantor or of the approval authority), but, in such case, the prospectus must also be made available free of charge in printed form upon request.

Once approved, the prospectus is valid for 12 months for purposes of a public offering in Switzerland and/or admission to trading on a Swiss trading platform, subject to the duty to update in case of material new developments (see below).

3) Contents of the Prospectus

Prospectuses must be prepared in an official language of Switzerland or in English. As to their contents, the FinSA only states the golden rule of prospectus drafting, *i.e.* that the prospectus must contain all information material for the investment decision of an investor, and lists some specific items with respect to the issuer and, if applicable, the guarantor, the securities, and the offering. The prospectus will also have to include a summary that contains the important information, presented in an easily comprehensible way. If benefiting from an exemption from the *ex ante* approval requirement, the prospectus must include the relevant disclaimer (see above).

The details of the required content of a prospectus are set out in annexes to the FinSO, as schemes for several classes of securities. The schemes are based on the well-established SIX regulations with some additional requirements as well as helpful clarifications. The schemes denote also where seasoned frequent issuers (*i.e.*, issuers of equity securities having been included in a leading Swiss index for at least two years and having outstanding debt instruments in a principal amount of at least CHF 1 billion) benefit from alleviations.

The FinSA explicitly permits a prospectus to incorporate certain information by reference. Such incorporation by reference is not permissible in the summary, and is only possible for documents published prior to, or concurrently with, the prospectus; so-called forward incorporation is thus not possible. Apart from these limitations, the FinSO will allow incorporation by reference as much as possible. Incorporation by

reference not only serves the interests of issuers, but also those of investors by precisely referencing the relevant information without unnecessary duplication.

In case of new developments that occur prior to the end of the subscription period or, for an admission to trading, prior to the start of trading on the relevant trading platform, if likely to materially affect the price of the securities, a supplement to the prospectus must be prepared and published. This supplement must also be approved by the approval authority prior to its publication within a maximum of seven calendar days. The approval authority is required to publish and maintain a list of events, the occurrence of which would generally *not* trigger an approval requirement, but simply a duty to publish a supplement to the prospectus.

4) Exemptions from the Duty to Publish a Prospectus

The FinSA introduces a set of explicit exemptions from the prospectus requirement largely in line with the Prospectus Directive and the Prospectus Regulation of the European Union and existing SIX regulations. Also, the Swiss National Bank, the Bank for International Settlements (BIS) and foreign central banks are generally exempted from the FinSA.

a) Type of Offering

The list of exempted transactions includes, *inter alia*, public offerings limited to professional clients (*e.g.*, financial intermediaries within the meaning of the banking act, the financial institutions act (including asset managers) and the collective investment schemes act, insurance companies, companies with a professional treasury and investment vehicles for wealthy private clients which have a professional treasury (likely to be family offices)), offerings addressed to less than 500 (non-professional) investors, and offerings with a minimum investment of CHF 100,000 or of securities with a denomination of at least CHF 100,000. Finally, offerings of less than CHF 8 million over a period of twelve months are exempted. While these exemptions largely mirror the new European Prospectus Regulation, including in particular the recently increased offering limit of CHF 8 million, the Swiss Parliament deviated from the EU regulation when in the final legislative efforts it increased the private clients exemption from 150 to 500 investors.

b) Type of Security

The public offering of certain types of securities may – subject to certain conditions – also be made without an approved prospectus. For example, the following transactions can all be made without an approved prospectus: the exchange of outstanding equity securities for equity securities of the same class, the delivery of equity securities following a conversion of debt instruments of the same issuer or any of its affiliates, the offering of securities to executives or employees, and the offering of money market instruments (including in particular commercial paper). For employee offerings the FinSA

is more liberal than the European Prospectus Regulation in that it no longer requires that "details of the offer" be provided; while this requirement was still contained in the draft FinSA, the parliament acknowledged that this would have created substantial legal uncertainty.

c) Exemptions for Admission to Trading

There are also exemptions from the prospectus requirement in the case of admission to trading without a concurrent public offering in Switzerland. For example, starting on the basis of the current listing rules of the SIX but then going beyond, the admission to trading of securities that, calculated over a 12-month period, account for less than twenty (currently ten) percent of the equity securities of the same class that are already admitted to trading on the same trading platform, can be made without a new prospectus. This increase in percentage mirrors the new European Prospectus Regulation.

Most notably, the FinSA also continues the SIX practice (*e.g.*, regarding the Sponsored Segment of the SIX) of exempting securities that are already traded on a foreign trading platform that is either deemed eligible by the trading platform or where the transparency for investors is otherwise safeguarded from the prospectus requirement. The FinSA also introduces a new prospectus exemption for admission to trading on trading segments that are only open to professional clients.

By contrast to the European Prospectus Regulation, which contains a number of exemptions for admission to trading verbatim mirroring the offering exemptions, this technical duplication is missing in the FinSA. But in the final deliberations a provision has been introduced to clarify that these exemptions shall apply *mutatis mutandis* for the admission to trading. Given that this last minute amendment is somewhat drafted broadly, the FinSO now explicitly clarifies which offering exemptions shall be available in case of an admission to trading.

d) Further Alleviations and Abridgment Options

The FinSO provides for additional alleviations and abridgment options from the prescribed prospectus content for well-known seasoned issuers.

e) Information outside of the Duty to Publish a Prospectus

The FinSA requires that if an offer is exempt from the duty to publish a prospectus the issuer or offeror must treat all investors equally if they provide relevant information to investors in connection with such offering.

f) Carve-out of Privately Placed Debt in the Banking Act

While the FinSA would allow non-regulated issuers to privately place debt to more than 20 offerees, such private placement have been considered deposit taking under the

Banking Act triggering the requirement to obtain a banking license. To address this problem, the FinSO amends the Banking Ordinance specifying that a Swiss-based issuer needs to provide documentary documentation on a number of specific information items such as name, seat and purpose of the issuer, financial statements, etc. This can be done either by way of a prospectus or a separate document or the addition of that information to a term sheet. With this solution the government reacted to criticism from the industry to its earlier proposal which required a full basic information document.

5) Basic Information Document

The FinSA requires offerors of financial instruments other than shares to prepare a basic information document if such offer is made to private clients. Originally it was intended to extend this requirement also to debt instruments, but heeding criticism, the FINSA excludes debt instruments without derivative elements from the requirement of having to prepare a basic information document. Further, the FinSO exempts, *inter alia,* the following securities from the basic information document: convertible bonds (provided they are convertible into shares of the same issuer or an affiliate within the same group), subscription rights in a rights offering, employee options, dividends in kind, floating rate bonds to the extent referring to benchmarks, inflation protection bonds, bonds with call and early redemption features, and zero coupon bonds. With this enumeration the Swiss legislator follows a much more flexible approach than the EU under the PRIPPs Regulation.

The FinSO contains the specific details for the format and contents for such basic information documents. While generally the FinSO follows the requirements for Key Investor Documents (KIDs) under the EU PRIIP Regulation, it contains helpful alleviations and more flexible standards. But FinSA also stipulates that instead of preparing a basic information document under the FinSA, one may also use a KID.

6) Prospectus Liability

Notwithstanding the new prospectus approval requirement, the prospectus liability regime applicable to anyone participating in the drafting of the prospectus that is currently provided for in Swiss civil law will continue to exist. Consequently, a person responsible for drafting or contributing to a prospectus may incur liability for false or misleading information contained in the prospectus or if the prospectus does not fulfill the legal disclosure requirements.

While the draft FinSA, as proposed by the Federal Council, required prospectus drafters to prove that they neither acted intentionally nor negligently, parliament did not adopt this reversal of burden of proof, acknowledging that this would have constituted a novelty in Swiss law and in particular would have required defendants to prove the non-existence of certain facts, a proof that would have been extremely difficult to establish in practice. Consequently, the FinSA in our view retains the existing proven liability regime and in particular does not introduce the fraud-on-the-market theory, which

would have assumed reliance on the prospectus by the investors when making the investment decision

While a prospectus will need to include forward-looking statements, liability for such statements is rightfully limited. Wrong or misleading forward-looking statements can only lead to prospectus liability if they are made against better knowledge or made without including a disclaimer that future developments are subject to uncertainty (similar to the bespeaks caution doctrine in the U.S.). Summaries can only lead to liability if they are still incorrect or misleading if read together with, or inconsistent with, the rest of the prospectus.

7) Criminal Liability

The FinSA also introduces criminal liability in case of an intentional violation of the Swiss prospectus rules. While a similar provision can be found in the Swiss Federal Act on Collective Investment Schemes, this concept not only is at odds with traditional Swiss law concepts but risks jeopardizing the overarching goal of introducing an attractive and competitive primary capital markets regime by ultimately discouraging issuers from using the Swiss markets for fear of criminal liability. Given that capital markets are extremely agile markets, adding criminal liability puts the Swiss market at a certain disadvantage, in particular as the European prospectus regulation does not provide for a similar criminal liability.

Also, the newly introduced criminal liability is unfortunately not really well-drafted. While the clause clearly states that only *material* omissions may trigger criminal sanctions, the wording is less clear for misstatements, and would theoretically allow that even minor misstatements could be sanctioned. Yet, in our view, the same standards must apply to misstatements and omissions, i.e. only *material* misstatements and only *material* omissions can be the subject of criminal sanctions.

8) Appraisal

Aside from the introduction of criminal liability for intentional non-compliance with Swiss prospectus rules, the FinSA introduces a modern and practical prospectus regime in Switzerland that in our assessment is largely compatible with the EU prospectus regime and other international standards.

In our view, by taking the Prospectus Directive and its exemptions as a model, by accepting that established Swiss practice should continue, and by giving regard to the needs of both small and medium-sized issuers as well as large well-known seasoned issuers, the proposed regime does not introduce major obstacles for Swiss and foreign issuers. Rather, it enhances transparency for investors and creates more legal certainty for issuers.

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Countdown at the Point of Sale – Final Version of Financial Services Ordinance Published

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On the way to the new Financial Services Act (FinSA), the final version of the Financial Services Ordinance (FinSO), which was published on 6 November 2019, started the final countdown towards the implementation of these new regulations in the light of their entry into force on 1 January 2020. As of that date, financial services providers must, in principle, comply with the new regulations (including the key adjustments made in the final version of the FinSO). However, various transitory provisions provide for (temporary) relief from the apparent time pressure.

By Sandro Abegglen / Luca Bianchi

1) Introduction

A ***big showdown*** is happening in the financial services and products industry in Switzerland: the ***entry into force of the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO) on 1 January 2020***. This date marks the end of a legislative process which was triggered by the financial crisis of 2008. On 6 November 2019 the ***final version of the FinSO*** was approved by the Federal Council. It was made publicly available on the same date together with the final version of the Explanatory Report to the FinSO (the ***Explanatory Report***). Based thereon, market participants who are within the scope of the new regulations are now finally in a position to complete their implementation design of the new point of sale duties.

Against this background, the authors do not aim to provide a summary of the regulatory point of sale duties set out in the FinSA and FinSO in general. Such overviews were provided over the last six years (see CapLaw-2018-58, 2017-3, 2016-3 and 2014-5). Instead, ***this article zooms in on the key adjustments which are specifically relevant for the point of sale made in the final version of the FinSO of 6 November 2019*** when compared with the Consultation Draft of the FinSO (Draft-FinSO) published on 24 October 2018.

2) Final Version of the Financial Services Ordinance: Key Adjustments at the Point of Sale vis-à-vis the Consultation Draft

The FinSO contains the following key adjustments in its final version of 6 November 2019 when compared with the Draft-FinSO:

– ***Geographical scope of financial services***: Neither financial services rendered from a foreign financial services provider within an existing client relationship (which was requested by the explicit initiative of a client) nor individual financial services (which were requested by the explicit initiative of clients from a foreign financial

services provider) shall be considered as performed in Switzerland and, thus, do not fall in the geographical scope of the FinSO (article 2(2)(a-b) FinSO). This provision aims to provide clarity regarding the special cases in which financial services are rendered from abroad to clients with domicile in Switzerland (Explanatory Report, p. 18).

– ***Financial services***: The term ***financial services*** conducted for clients according to article 3(c) FinSA shall contain any activity directed to specific clients which specifically targets the purchase or sale of financial instruments (article 3(2) FinSO). According to the Explanatory Report, p. 19, the distribution of collective investment schemes typically falls in the scope of this provision and, thus, qualifies as a financial service.

  However, various exemptions of the term financial services in the meaning of article 3(c) FinSA have been inserted in the FinSO. In particular, ***the following shall not be considered as financial services*** (article 3(3)(a-d) FinSO):

  (a) advice on the structuring or raising of capital, mergers of companies and the acquisition or disposal of holdings, as well as the services connected with such advice (***corporate finance advisory exemption***);

  (b) placements of financial instruments with or without a fixed takeover obligation as well as related services (***capital markets placements exemption***);

  (c) financing within the framework of services pursuant to (a) and (b);

  (d) granting of loans for the execution of transactions with financial instruments within the meaning of article 3(c)(5) FinSA, if the financial services provider granting the loan is not involved in these transactions, unless he knows that the loan will be used for the execution of such transactions.

– ***Financial instruments***: Article 3(1) FinSO now explicitly states that claims arising out of a bank account or custody agreement for payment or physical delivery (in particular, of foreign currencies, fixed-term deposits or precious metals) shall not qualify as financial instruments within the meaning of article 3(a) FinSA.

– ***Reverse solicitation***: Article 3(6)(a) FinSO clarifies that the provision of information at the instigation or initiative of a client (***reverse solicitation***), which has not been preceded by advertising within the meaning of article 68 FinSA by the provider or one of its agents in relation to the specific financial instrument, does not constitute an offer in terms of article 3(g) FinSA (note: but, except in crossborder inbound situations (see above under "Geographical scope of financial services"), could still be

considered as a financial service if no exemptions apply (see above under "Financial services")).

– ***Execution-only***: When a financial services provider is executing and transmitting client orders, a private client can agree in general manner that the KID be only made available after the transaction has been concluded (article 11(3) FinSO). However, this consent must be given separately from the agreement to the general terms and conditions in writing or in any other form which enables proof to be rendered by text (article 11(3) FinSO). A KID shall be regarded as ***existing*** in terms of article 8(4) FinSA and must, thus, in principle, be made available by the financial services provider in connection with execution-only transactions if it can be located with reasonable efforts (article 11(2) FinSO).

– ***Information duties***: The obligation of financial services providers to notify clients in the event of changes with respect to their information duties under article 8 and 9 FinSA previously suggested in the Draft-FinSO has been deleted in the final FinSO (article 14 FinSO). This adjustment significantly reduces administrative efforts and costs for financial services providers which would otherwise have been expected. The Swiss Bankers Association (SBA) has published an update of the SBA-risk brochure with the title *Risks Involved in Trading Financial Instruments* (version of November 2019) on 23 October 2019, which may be used as a standardized document to fulfil the information duty regarding the general risks associated with financial instruments according to article 8(1)(d) FinSA.

– ***Fee transparency***: The FinSO explicitly provides for the duty of financial services providers to ***inform approximately or in ranges*** about ***costs which cannot or only with disproportionate effort be precisely determined in advance*** (article 8(3) FinSO). If such information is not possible or only possible with disproportionate expenses this shall be disclosed (article 8(3) FinSO). In particular, the risk of additional fees, expenses or other costs must be pointed out (article 8(3) FinSO).

– ***Suitability / appropriateness***: When performing a ***suitability check*** the financial services provider is now explicitly obliged to draw up a ***risk profile*** for each client based on the information obtained (article 17(3) FinSO). In the case of investment management mandates and permanent advisory relationships, the provider must agree on an investment strategy with the client on this basis (article 17(3) FinSO). Besides, financial services providers who ***inform their clients about the non-performance of the appropriateness and suitability check*** in terms of article 13(2) FinSA ***only once*** must expressly draw attention to this fact when providing the information (article 17(5) FinSO).

– ***Organizational requirements***: The organizational requirements of financial services providers (which are related to the point of sale) set out in articles 23-30

FinSO were primarily subject to rather technical or formal amendments. However, the settlement of a price deviating from the actual closing price achieved in the execution of client orders (price fraud) is now explicitly stated as an inadmissible form of market behavior in article 27(d) FinSO.

– ***Client advisers of foreign financial services providers***: Client advisers of foreign financial services providers which are subject to a prudential supervision are no longer required to register in the client adviser register as long as they conduct their (inbound) financial services ***exclusively to professional or institutional clients*** in Switzerland (article 31 FinSO). This adjustment represents a major liberalization for foreign client advisers of prudentially supervised financial services providers. However, financial services of foreign providers rendered to ***private clients*** in Switzerland require a registration of their client advisers in the Swiss client adviser register (notwithstanding whether the foreign financial services providers are prudentially supervised or not) (article 28(1-2) FinSA *e contrario*). The obligation to register was further clarified in the Explanatory Report by stating that this obligation can of course also be fulfilled by financial services providers for their client advisors (Explanatory Report, p. 33).

  Besides, also all ***foreign*** financial services providers ***will still need to comply with Swiss regulation*** in terms of the ***rules of conduct*** of article 7 et seq. FinSA (to the extent applicable according to article 20 FinSA) and the ***organizational requirements including conflict of interest rules*** of article 21 et seq. FinSA.

– ***Advertisements***: Article 95(3) Draft-FinSO on the regulation of advertisements for financial instruments that have not been approved or do not correspond to the customer profile was deleted (article 95 FinSO). However, FINMA-Circular 2013/9 "Distribution of Collective Investment Schemes" which includes similar requirements for collective investment schemes is expected to continue to apply according to the Explanatory Report, p. 65. It remains to be seen, however, if and to what extent FINMA-Circular 2013/9 will be adjusted by FINMA.

3) Final Countdown: Entry into Force and Transitory Periods

a) Adjustments in the Final FinSO

FinSA and ***FinSO will enter into force on 1 January 2020***. Consequently, the new regulation is, in principle, applicable starting from this date. However, as an ***exception from this rule***, the ***transitory periods*** set out in article 95 FinSA and articles 103 et seq. FinSO provide for a limited time period during which almost all of the new regulatory point of sale rules will not have to be observed (already on 1 January 2020). This article ***focuses primarily on the point of sale regulation of the FinSA and FinSO*** and does not contain references to transitory provisions in other areas.

The ***transitory periods have been adjusted to two years (instead of one year)*** for the following:

- ***client segmentation of article 4 FinSA*** (article 103(1) FinSO);
- ***required knowhow of client advisers of article 6 FinSA*** (article 104 FinSO);
- ***conduct rules of articles 7-18 FinSA*** (including – new – the best execution duty) (article 105(1) FinSO);
- ***organizational requirements of articles 21-27 FinSA***, including the requirements for an appropriate organization (article 21 FinSA), the required skills, knowledge and experience of employees (article 22 FinSA), the involvement of third-parties (article 23 FinSA), the chain of providers (article 24 FinSA), conflicts of interests rules (article 25 et seq. FinSA), also, regarding payments such as inducements from third-parties (article 26 FinSA) and regulation of employee transactions (article 27 FinSA) (article 106(1) FinSO).

As a result, financial services providers benefit from longer time periods than previously expected to comply with the point of sale duties. However, the transitory period regarding conduct rules according to article 105(1) FinSO ***does not include*** the requirements for ***securities lending*** according to article 19 FinSA which are, therefore, applicable immediately with the entry into effect of the FinSA/FinSO (Explanatory Report, p. 69). Thus, article 19 FinSA represents the only rule of conduct which will be applicable immediately with the entry into force of the FinSA and FinSO.

b) Conduct Rules and Organizational Requirements during the Transitory Periods in Particular

Financial services providers which intend to fulfil the conduct rules of articles 7-18 FinSA and/or the organizational requirements of articles 21-27 FinSA before the end of the transitory period must irrevocably notify their audit firm in writing and indicate the date on which the new rules shall be complied with (articles 105(2) and 106(2) FinSO). Until that point in time, the following pertinent conduct and organizational rules of the old regime continue to apply as newly specified in articles 105(3)(a-f) and 106(3)(a-f) FinSO:

(a) ***code of conduct for securities dealers*** according to article 11 Stock Exchange Act (SESTA);

(b) ***code of conduct for CISA-licensees*** set out in article 20 Collective Investment Schemes Act (CISA);

(c) ***requirements for investments, securities transactions and the exercising of memberships and creditor's rights*** of the CISA in accordance with articles 21-23 CISA;

(d) ***further conduct rules of the CISA*** pursuant to article 24 CISA such as the duty to conclude distribution agreements and the protocol duty;

(e) ***requirement to appoint a representative and a paying agent*** for the distribution of foreign collective investment schemes which are distributed ***exclusively to qualified investors*** (article 120(4) CISA);

(f) ***self-regulation recognized as a minimum standard for financial services and offers of collective investment schemes*** by FINMA pursuant to article 7(1) and (3) Financial Market Supervision Act (FINMASA).

c) Time Table: Transitory Periods

<table>
<tr><th colspan="4">Transitory Periods (Selection)</th></tr>
<tr><th>Topic</th><th>2020</th><th>2021</th><th>2022</th></tr>
<tr><td>FinSA/FinSO</td><td colspan="3">Applicable as of 1 January 2020 (general rule which may be subject to the following exemptions, respectively, transitory provisions)</td></tr>
<tr><td>Client segmentation
(article 4 FinSA;
article 103(1) FinSO)</td><td colspan="2">Transitory period</td><td>Applicable as of 1 January 2022</td></tr>
<tr><td>Required knowhow of client advisers
(article 6 FinSA;
article 104 FinSO)</td><td colspan="2">Transitory period</td><td>Applicable as of 1 January 2022</td></tr>
<tr><td rowspan="2">Conduct rules
(article 7-18 FinSA;
article 105(1-2) FinSO)</td><td colspan="2">Transitory period</td><td rowspan="2">Applicable as of 1 January 2022 or,</td></tr>
<tr><td colspan="2">alternatively, applicable earlier upon implementation/notification of audit firm</td></tr>
<tr><td rowspan="2">Organizational requirements
(article 21-27 FinSA;
article 106(1-2) FinSO)</td><td colspan="2">Transitory period</td><td rowspan="2">Applicable as of 1 January 2022 or,</td></tr>
<tr><td colspan="2">alternatively, applicable earlier upon implementation/notification of audit firm</td></tr>
<tr><td rowspan="2">Registration of client advisers
(article 95(2) FinSA;
article 107 FinSO)</td><td rowspan="2">Transitory period</td><td colspan="2">Either applicable as of 1 July 2020 or,</td></tr>
<tr><td colspan="2">alternatively, applicable at a later point in time six months after approval/designation of a register</td></tr>
<tr><td rowspan="2">Ombudsman's office
(article 95(3) FinSA;
article 108 FinSO)</td><td rowspan="2">Transitory period</td><td colspan="2">Either applicable as of 1 July 2020 or,</td></tr>
<tr><td colspan="2">alternatively, applicable at a later point in time six months after recognition of a ombudsman's office</td></tr>
</table>

4) Conclusion

The final FinSO provides for some important and welcome adjustments of point of sale-related provisions when compared to the Consultation Draft. Especially, the concept of financial services has been adapted (in line with the diverging opinions of market participants in the consultation) in order to be ***neither too broad nor too narrow*** (Explanatory Report, p. 11). This Solomon-like compromise regarding whether distribution of financial instruments shall qualify as a financial service (which is, in principle, the case for the distribution of collective investment schemes but not for placements of capital markets transactions; article 3(2-3) FinSO) is well-intended but raises some questions which will have to be resolved in practice in the near future.

Also, the generous and broadly applicable transitory period of two years is very welcome and allows financial services providers to implement the new regulation diligently and without undue rush. In our view, this, combined with the general design of the new regulation, evidences the good and balanced judgment of the Swiss legislator.

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The Basic Information Sheet – No surprises in the final implementing ordinances, but some relevant amendments

Reference: CapLaw-2019-53

On 1 January 2020 the new Swiss Financial Services Act (FinSA) and its implementing ordinance, the Financial Services Ordinance (FinSO), will come into effect. The Swiss Federal Council announced its decision on the entering into force of the new financial services regulation and the final text of the implementing ordinances on 6 November 2019. There are no big surprises in the final ordinances regarding the newly introduced basic information sheet (*Basisinformationsblatt*). However, a number of amendments were made based on responses in the consultation process of the draft ordinances.

By Daniel Haeberli

1) No surprises in respect of the content requirements

One of the key novelties introduced by the FinSA is the obligation to prepare and make available a short document setting out the key information, the so-called basic information sheet (*Basisinformationsblatt*; BIS), often referred to also as the "key information document" or "basic information document".

This basic information sheet must contain all information for the investment decision in such a way that is easily comprehensible and designed to assist the investor in comparing the financial instrument being offered to other financial instruments.

The key elements that need to be covered in the BIS are set out in article 60 FinSA, while the introduction of supplementary provisions on the BIS was delegated to the Federal Council pursuant to article 63 FinSA. The FinSO, thus, provides in articles 88 to 90 the supplementary provisions on the content, language, layout and scope of the BIS and in annex 9 of the FinSO a template and content specifications of the BIS.

While on its face these requirements are largely aligned with those applicable to the key information document (KID) under the EU PRIIPs Regulation, they are less detailed as well as less onerous and leave much more flexibility. The biggest differences between the PRIIPs Regulations and the FinSO regarding the content requirements are in reference to the description of the risks and rewards of the financial instrument (*i.e.*, "What are the risks and what might I get back in return?"). The approach taken in the FinSO provides for a lot of flexibility and avoids some of the flaws of the summary risk indicator and performance scenarios of the PRIIPs KID. However, the rather lean regulations under the FinSO and flexibility provided by the FinSO allows for different presentations of risk and performance scenarios. This may ultimately result in various manufacturers presenting risks and performance scenarios in different ways and making basic information sheets less comparable. While the EU has a very strong focus on comparability, Switzerland has taken a different view. The Swiss regulations focus less on standardizing the information in the BIS, but allowing the market to develop a standard.

The final text of the FinSO does not contain any substantive amendments to the draft FinSO that was subject to the consultation process, at least in respect of the provisions relating to the BIS. Accordingly, there were no surprises as to the content requirements of the BIS when the Swiss Federal Council published the final text on 6 November 2019.

The Swiss Federal Council did, however, make some relevant amendments in the final text of the FinSO based on results of the consultation process.

2) Relevant amendments in the final ordinances

a) The BIB and the equivalent foreign document – the PRIIPs KID, but not the PIB

Article 59 para. 2 FinSA provides that documents prepared under foreign regulations which are equivalent to the BIS may be used instead of a BIS. Based on article 63 lit d FinSA it is for the Swiss Federal Council to determine what foreign documents are

equivalent to the BIS. The draft FinSO, which was subject to the consultation process, listed the PRIIPs KID and the German product information sheet (so-called "*Produktinformationsblatt*"; PIB) as equivalent foreign documents. The final FinSO now only refers to the PRIIPs KID. Accordingly, the PRIIPs KID is the only foreign document that may be used as a substitute to the BIS.

b) The BIS and execution-only transactions

In general, a financial service provider when recommending a financial instrument to a retail client (article 8 para. 3 FinSA) has to make available a BIS. According to article 8 para. 4 FinSA, no BIS has to be made available in case of an execution only transaction (*i.e.*, if the service consists exclusively in the execution of client orders without providing any advice). At a rather late stage of the parliamentary discussion of the FinSA, this provision was amended by adding the exemption that making a BIB available only applies if no other already exists. In the consultation process of the draft ordinances, a number of participants commented on this restriction of the exemption and asked for clarification in the ordinance when a BIB is deemed as already existing for purposes of article 8 para. 4 FinSA.

The final text of the ordinance takes up this point and states that a BIB is deemed already existing if it can be found with reasonable efforts (article 11 para. 2 FinSO). Obviously, it is subject to interpretation what actions a financial service provider has to take in order to comply with the reasonable efforts obligation. According to the explanatory report, this should normally be an Internet search since it may be expected that manufacturers will generally publish the BIS on their website. However, a financial service provider should also be able to discharge its reasonable efforts obligation by other means than an Internet search. It must, for example, be sufficient, if the financial series provider has access to a professional centralized documentation repository that collects BIS' from manufacturer.

Another relevant amendment in the final text of the ordinance is the new provision in article 11 para. 3 FinSO. While in principle, the BIS has to be made available prior to executing a transaction, this provision allows retail clients to agree to only receive the BIS after the execution of the transaction. This exemption is, however, only available in respect of execution-only transactions and takes into account that in such a situation it is for practical reasons generally not possible to make the BIS available prior to the execution of the transaction. In such situations, timing is essential and retail investors should have the possibility to immediately execute the transaction. Accordingly, it is likely that financial service provider will seek a general consent from their retail clients when opening a securities account. Such consent may, however, not be included in the bank's general terms and conditions, but must be obtained in a separate document.

c) The BIB and financial instruments that are created for a single counterparty

While, in general, a BIS has to be prepared for all financial instruments according to article 58 FinSA, shares and debt instruments without a derivative character are explicitly exempted pursuant to article 59 FinSA (see also article 86 FinSO, which substantiates the exemption). The final ordinance provides a further exemption in article 80 para 2 FinSO: no BIS is required for financial instruments that are created for a single counterparty. This exemption aims in particular at derivatives that are based on a bilateral contract, such as interest rate and currency futures and swaps that are based on a master agreement, such as the ISDA Master Agreement. Conceptually such bilateral financial instruments do not really have a manufacturer. Whether this exemption also applies to, for example, individually tailored structured products for a specific investor is debatable, as is the question whether (as a matter of principle) there is a sufficient legal basis for this exemption in the FinSO.

d) The BIB during the transitional period

In the final text of the ordinance, the transitional period in respect of the requirement to prepare a BIS has been extended to two years. Accordingly, for collective investment schemes a simplified prospectus or key investor information document, pursuant to the Collective Investment Schemes Ordinance, and for structured products, a simplified prospectus pursuant to the Collective Investment Schemes Act, may be prepared instead of a BIS until 1 January 2022.

Pursuant to the explanatory report, it is, however, not permissible to prepare both documents (*i.e.*, a simplified prospectus or key investor information document and a BIS). The reasoning for this restriction is that it may confuse retail clients if they receive both documents, as the content of the two documents is not identical. However, the practical impact of this prohibition should be minimal.

No such restriction applies in respect to the UCITS-KIID and the PRIIPs KID. These documents may be prepared in addition to the simplified prospectus or key investor information document, both during and after the end of the transitional period. This is important as, for example, most Swiss manufacturers of structured products already prepare a PRIIPs KID today. Furthermore, from a regulatory perspective, it is fine to prepare a PRIIPs KID as well as a BIS for the same product. Providing retail investors with both documents may entail some risks from a civil law perspective, as the content of the two documents is not identical. Since the legislator treats the two documents as equivalent, it may, however, be difficult to make a sound argument for civil liability on the basis that the PRIIPs KID and the BIS contain different information.

e) The product documentation for structured products during the transitional period

The transitional period for the prospectus regime pursuant to article 109 FinSO means, in relation to structured products, that no prospectus must be prepared until at least October 1, 2020. No prospectus means that no prospectus within the meaning of the FinSA nor a prospectus pursuant to article 1156 of the Code of Obligations nor a simplified prospectus pursuant to article 5 of the Collective Investment Schemes Act must be prepared. Only in case where structured products shall be listed on a Swiss exchange, a listing prospectus pursuant to the current listing regime must be prepared. Furthermore, during the transitional period of article 111 FinSO, a simplified prospectus pursuant to the Collective Investment Schemes Act in its version of March 1, 2013 can be prepared instead of a BIS or PRIIPs KID. The current exemption from preparing a simplified prospectus in case of listed structured products (article 4 para. 4 of the Collective Investment Schemes Ordinance) is, however, no longer available after January 1, 2020.

3) Additional remarks

a) Duty to prepare the BIS

A BIS has to be prepared by the manufacturer in case a financial instrument is offered to private clients in Switzerland (article 58 para 1 FinSA and article 80 FinSO). This is a point of production duty, which is triggered at the point of sale. Accordingly, in case the manufacturer is not identical with the offeror of the financial instrument, it is to be expected that the manufacturer and the offeror will address the manufacturer's duty to prepare a BIS in a distribution agreement.

Relating to a non-Swiss manufacturer, the question is whether the duty to prepare a BIS extends to such foreign manufacturer. The Swiss regulations are based on the principal of territoriality. Of course, there are certain cross-border situations that fall within the scope of the Swiss regulations based on an explicit statutory provision. The FinSA does, however, not explicitly state that non-Swiss manufacturers are obliged to prepare a BIS. Furthermore, the criminal sanctions in the FinSA do not apply in case a BIS is not prepared. Merely the non-publication of the BIS is subject to criminal sanctions (article 90 FinSA).

In case a manufacturer does not intent to prepare a BIS, it needs to be ensured that the product documentation prepared at the point of production includes a respective statement. In particular, in respect of financial instruments that are to be offered exclusively to professional investors and asset management clients without a BIS, (article 58 para. 2 FinSA exempts manufacturers from preparing a BIS if the financial instrument may only be purchased in the context of a asset management mandate), the product

documentation should include a relevant selling restriction and statement that no BIS is being prepared.

b) Duty to publish and make the BIS available

If and when a financial instrument, for which a BIS has to be prepared, is publicly offered, it has to be published (article 66 FinSA). This duty can be met by making hard copies available free of charge at the seat of the issuer, lead manager or offeror or by making it accessible on the website of the issuer, lead manager or offeror or the website of the exchange or the Review Body (*Prüfstelle*) (article 64 in connection with 66 FinSA).

In case of a personal recommendation in respect of a financial instrument for which a BIS has to be prepared, the financial service provider has to make a BIS available to the private client (article 8 para. 3 FinSA). Making available means that a copy of the BIS has to be handed out or emailed to the client. Alternatively, the BIS may be made accessible on a website. The service provider must then ensure that the BIS remains accessible for as long as the financial instrument is offered and that the client is aware of the website's address and, if no deep link is provided, where to locate the BIS on the website.

In order to meet the publishing duty as well as the duty to make the BIS available, making the BIS accessible on a website seems to be the most practical approach. There is no transitional period for these duties. Hence, they apply as of 1 January 2020. This is important to note as no such obligation applies under the pre-FinSA regime. Offerors and financial service providers, respectively, will need to implement a process ensuring the duties to publish and make available the BIS are being complied with as from 1 January 2020.

4) Final remarks

The amendments help to ensure that the provisions on the basic information sheet can be implemented and complied with in a meaningful way in practice and the two year grace period, during which the simplified prospectus and the key investor information document can be used, enables a smooth transition to the new regime.

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Update: The Enforcement of Clients' Rights in the Financial Services Act

Reference: CapLaw-2019-54

The Financial Services Act (FinSA) as it will enter into force on 1 January 2020 contains two elements of an initially broad set of proposals meant to strengthen the enforcement of clients' rights. First, it specifies the scope of records to be kept regarding a service provider's relationship with a client and gives the client an unambiguous legal basis to obtain a copy of such records on request. Second, it will require all providers of financial services to be affiliated with an ombuds institution. Parliament ultimately opposed the introduction of new procedural mechanisms such as collective action instruments and changes to the 'loser pays' rule, referring to ongoing efforts towards a broader reform of the Civil Procedure Code.

By Thomas Werlen / Jonas Hertner

1) Introduction

One of the primary drivers of a new law governing the provision of financial services was the realization, in the wake of the financial crisis of 2007/2008, that the current laws often did not allow retail investors to enforce monetary claims against financial institutions, in particular with respect to relatively small claims. The insolvencies of the Lehman Brothers and Kaupthing groups, for instance, left scores of investors without an effective remedy, mainly for two reasons. First, both procedural and substantive law make it difficult for individual investors to establish proof of misconduct of their financial service provider. Second, litigation against financial service providers is costly to the point that damaged investors were discouraged from trying to enforce their rights if the damages incurred were relatively small.

The original preliminary draft of the FinSA, issued by the Federal Council in June 2014 included relatively far-reaching proposals to strengthen the enforcement of clients' rights. These proposals were heavily criticized by the financial industry in the public consultation proceeding. In response, in November 2015, the Federal Council put forward a draft bill, which significantly curtailed the proposed changes (for a summary of the legislative history, see WERLEN/HERTNER, *The Enforcement of Clients' Rights in the Financial Services Act*, CapLaw 19 December 2018). This article is an update to the December 2018 publication following the publication of the final text of the Financial Services Ordinance (FinSO).

The enforcement of clients' rights in the final text of the FinSA rests on the two remaining pillars of (1) a client's right to be provided a comprehensive copy of all documents and records the service providers keep concerning the specific client and the client relationship, and (2) the ombuds system, requiring all service providers – not only the banks – to be affiliated with an ombuds institution recognized by the Federal

Department of Finance. These two pillars, however, do not tower above the existing framework and are not expected to significantly change the litigation landscape in the financial services industry.

2) The provider's obligation to keep records and the client's right to obtain the records

a) The duty of the service provider to keep records and to give account upon client's request

Art. 15 and 16 FinSA and Art. 18 and 19 FinSO contain the substantial requirements in terms of records to be kept by the service provider:

- Art. 15(1), 15(2) and 16(2) FinSA in connection with Art. 19(1) FinSO set out the scope of the records to be kept.

- Specifically, Art. 15(1) FinSA requires service providers to keep records on (a) the services to be provided as agreed upon with the client and the information gathered from the client, (b) any waiver from the requirement to assess the suitability and appropriateness pursuant to articles 13 and 14 FinSA, and (c) all financial services provided (whereas Art. 18 FinSO specifies that the service provider must keep records in a manner that allows it to give account to the client on the services provided within ten working days).

- For advisory contracts, Art. 15(2) FinSA additionally requires the service provider to keep records on the client's investment needs and requirements and the reasons for each recommendation that results in the purchase of the recommended product.

- In addition, Art. 16(2) FinSA requires the service provider to provide information regarding (a) the services which were agreed upon and executed, (b) the composition, valuation and development of the portfolio, and (c) the costs associated with the provision of the services.

- Art. 19(1) FinSO essentially repeats the requirements contained in Art. 15(1) and 16(2) FinSA.

- Moreover, Art. 16(1) FinSA requires the service provider to transmit the information in writing pursuant to Art. 15 FinSA to the client upon request or to provide it by any other suitable means.

b) The client's right to be provided all documents concerning their relation with the service provider

Art. 72 and 73 FinSA and Art. 97 FinSO govern both the substantial and procedural aspects of the client's right to request the records kept by the service provider:

- Art. 72(1) FinSA entitles the client to request at any time a comprehensive copy of the „Dossier", including all records, which the service provider is required to keep pursuant to Art. 15 FinSA, as well as any additional records, which the service provider created or maintains in respect of the relation with the client.

- Art. 73(1) FinSA requires the request to be made in writing. The service provider is required to provide the copy within 30 days free of charge (para. 2).

- Article 73(3) FinSA entitles the client to pursue the right to a copy of the records in summary proceedings if the service provider does not comply with client's request.

- Article 73(4) FinSA stipulates that a refusal by the service provider to comply with the request may be taken into consideration by the court in a later litigation when allocating the costs of the proceedings.

- Art. 97 FinSO, finally, stipulates that, while the first copy of information must be provided free of charge, any subsequent request, if not sufficiently justified, may incur an appropriate fee.

- The annotations to the FinSO, issued by the Federal Council in November 2019, note that the client's right to be provided records is not meant to include any preliminary internal documents such as drafts, notes or internal assessments.

3) The ombuds system

Art. 74 et seq. FinSA introduce the new ombuds system, which will require all service providers to fund and be affiliated with a particular ombuds institution as follows:

- Art. 75(1) FinSA governs the ombuds procedure and requires these proceedings to be "non-bureaucratic", fair, swift, impartial, and free or cost-effective for the client.

- The ombuds proceeding is confidential, meaning that the statements made in the proceedings must not be used in another proceeding (para. 2).

- The confidentiality also covers party submissions: neither party has a right to see the correspondence between the other party and the ombuds institution (para. 3).

- The client may initiate a proceeding before the ombuds institution (1) in accordance with the respective regulations of the institution, (2) if the client can demonstrate that he or she notified the service provider of an issue and undertook a reasonable effort to resolve it, (3) if the client's claim is not manifestly ill-founded and was not subject to a previous conciliation proceeding, and (4) if the issue is not currently, and was not previously, pending before a judicial body (*e.g.*, another ombuds institution, a state court or a conciliatory authority) (para. 4).

Notably, the requirement that the issue is not yet and was not pending before a judicial body should not mean that clients were prohibited from bringing a dispute to the ombuds institution after filing an action in court to obtain records pursuant to Art. 73(3) FinSA.

– While the ombuds institution will not have discretion to issue a decision on the matter brought before it, it may give its own factual and legal assessment and include it in the final communication to the parties (Art. 75(8) FinSA).

– Pursuant to Art. 76 FinSA, an ombuds proceeding does not preclude a civil proceeding covering the same matter (para. 1). If, however, a judicial body seizes the matter, the ombuds institution concludes its proceeding (para. 3). If an ombuds proceeding was undertaken, but did not result in a resolution of the dispute, the claimant in a civil proceeding may unilaterally decide to waive the conciliation stage pursuant to the Civil Procedure Code (para. 2).

– Art. 77 et seq. FinSA stipulate the obligations of service providers in connection with the ombuds system. Notably, service providers must affiliate themselves with a recognized ombuds institution; participate in an ombuds proceeding if so requested by a client; and duly honor all requests to appear and submit statements in the proceeding.

– Service providers must inform their clients about the possibility to request an ombuds proceeding in connection with the opening of a client relationship, when rejecting a claim made by a client, and anytime upon request.

– The funding of a particular ombuds institution shall be governed by an institution's own regulations, borne by its service provider participants in proportion to their use of the institution (Art. 80 FinSA).

– With respect to the organizational aspects of the ombuds system, Art. 81–83 FinSA broadly govern the membership of service providers, providing that ombuds institutions need to accept service providers if they meet the institution's own membership criteria, and that service providers may be excluded if they violate their obligations pursuant to Art. 77–80 FinSA. Ombuds institutions are required to notify the supervisory authority and the central register of ombuds institutions (both likely to be within the Federal Department of Finance) of all service providers accepted as members and of those not accepted or subsequently excluded (Art. 83 FinSA).

– The ombuds institutions themselves shall be recognized by the Federal Department of Finance if they meet the requirements of Art. 84 FinSA. Notably, they (and the ombudspersons engaged by the institution) are required to be impartial and independent, and that the ombudspersons are sufficiently competent. Institutions

further need to have regulations governing its organization and membership of service providers, the ombuds procedure, and the financial contributions of service providers. Any amendment of internal regulations will have to be approved by the supervisory authority (Art. 85 FinSA). Ombuds institutions shall publish annual reports on their activities (Art. 86 FinSA).

4) Conclusion

What had started with an attempt to significantly strengthen the means by whichretail clients of financial service providers could pursue legitimate claims – relatively small claims in particular –against service providers, essentially resulted in a mere restatement of the status quo.

First, the provisions governing the right of clients to be provided with a full documentation of records relevant to the client relationship do not add to the existing tool set provided by the provisions governing the agency contract in the Code of Obligations and the Data Protection Act.

Second, as regards the provisions governing the ombuds system, the Federal Council noted in its annotations to the FinSO that the ombuds institution will essentially be a continuation of the existing ombuds system for the banking industry (*Erläuterungen zum FIDLEG, 6 November 2019, p. 66*). The same annotations refer to the ombuds framework as introduced by the FinSA as a process following the adversarial system ("*kontradiktorisches Verfahren*") (*Ibid, p. 66*). It is difficult to envisage an effective adversarial process given the extensive confidentiality rules, which prevent both parties from taking into account submissions made by the other. In light of this, it will also be interesting to observe to what extent courts will take into consideration assessments prepared by an ombuds institution.

With respect to the ombuds system, other question marks remain too – such as how and to what extent the supervisory authorities will make use of Art. 88 FinSA, which allows for the sharing of information between the authorities and bodies created by the FinSA, including the ombuds institutions. Is FINMA going to request information from ombuds institutions that service providers submitted on a confidential basis?

In sum, the omission to introduce new procedural tools specifically devised to facilitate the enforcement of relatively small claims of retail clients will mean that the subject remains on the parliamentary agenda for consideration in the context of a broader revision of the Civil Procedure Code. In the meantime, retail investors will look to FinSA's more substantial provisions such as new rules of conduct for service providers and extensive disclosure obligations.

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The New Registration Duty for Client Advisers – An Update on the Final FinSO

Reference: CapLaw-2019-55

On 6 November 2019, the Federal Council decided that the Financial Services Act (FinSA) would enter into force on 1 January 2020. Subject to a transition regime, the FinSA will introduce a new registration duty for client advisers of Swiss financial service providers not subject to prudential regulation and client advisers of foreign financial institutions. Today, no such registration requirement exists with the exception of similar obligations for untied insurance intermediaries, who have to register with the public register kept by the Swiss Financial Market Supervisory Authority (FINMA).

Under the new regime, client advisers will be required to register in a register maintained by one or more registration bodies licensed by FINMA. To register, they must evidence sufficient knowledge of the rules of conduct under the FinSA and the necessary expertise to perform their duties, adequate financial means as well as affiliate themselves with an ombudsman's office. Clients may check the register at any time to verify that their adviser has the required qualifications. The registration will, however, not imply any prudential or ongoing supervision by FINMA. If a client adviser no longer meets the registration requirements, the adviser will be deleted from the register by the competent registration body and may, consequently, no longer engage in activities as a client adviser.

By Martin Peyer

1) Introduction

Client advisers play an important role in implementing the new rules of conduct in articles 7 ff. FinSA. They are usually the primary point of contact for clients with their financial service provider and, only if they have sufficient knowledge of the new rules, they can comply with them in practice.

The responsibility to ensure that its client advisers will comply with the requirements of the FinSA lies with the financial service providers. In particular, they must ensure that their advisers have an appropriate education and the necessary skills for the specific services they provide (article 6 FinSA). For prudentially supervised financial service providers, FINMA or a supervisory organization pursuant to the Financial Institutions Act (FinIA) will monitor that client advisers comply with these requirements. No such controls exist, however, for Swiss and foreign financial service providers that are not supervised by FINMA.

To bridge this gap, the FinSA will require client advisers of Swiss financial service providers who are not prudentially supervised (such as insurance intermediaries and financial advisers) and financial service providers domiciled abroad to register themselves in the new register of advisers that will be established under the FinSA (article 28 (1)

FinSA) (*see* Dispatch by the Federal Council on the Financial Services Act and the Financial Institutions Act of 4 November 2015, Federal Gazette 2015 (Dispatch FinSA), page 8901 ff., page 8967). In addition, to protect clients, client advisers who have seriously breached the rules of conduct in the past will not be allowed to register themselves and, thus, to provide financial services. Further, advisers – or the financial service provider for which they work – must guarantee that they have sufficient financial resources to carry out their business activities (*see* Dispatch FinSA, page 8922).

The registration will, however, not imply any prudential or ongoing supervision by Swiss authorities. It only seeks to ensure that client advisers are aware of the rules of conduct and treat clients fairly. Yet, clients may check the register, which will be available over the internet, at any time if they have doubts about the qualifications or integrity of their client adviser (article 32 (5) FinSA), and, therefore, the new register is also expected to increase clients' confidence in their client advisers.

2) Duty to Register for Client Advisers

a) Definition of Client Adviser

According to article 3 (e) FinSA, a client adviser is a natural person who performs financial services on behalf of a financial service provider or in its own capacity as financial service provider. In most cases, the adviser is not identical with the financial service provider for which it acts. Only if a natural person provides financial services, it may at the same time be both, a client adviser and a financial service provider (Dispatch FinSA, page 8922 and 8947 f.).

The term "client adviser" has to be interpreted broadly and includes persons that carry out transactions in financial instruments for clients or advise them in connection with their investments such as asset managers, financial advisers and insurance intermediaries. Moreover, activities of distributors of collective investment schemes that are directed at a specific client aiming specifically to sell or purchase securities (*see* article 3 (2) Financial Services Ordinance (FinSO)), such as roadshows in which foreign collective investment schemes are advertised (Explanatory Report of the Federal Department of Finance of 6 November 2019, page 19), also constitutes a financial service pursuant to the FinSA if it is carried out on a professional basis. Thus, persons formerly holding a license as distributor of collective investment schemes will also have to register in the register of advisers if they provide true sales-related services to clients (unless an exemption applies). By no longer including distribution generally in the catalog of financial services, the FinSO departs from the much more extensive view taken in the draft ordinance. Nevertheless, substantial uncertainty remains whether certain other services for instance relating to roadshows and similar activities constitute a financial service under the FinSA considering the fact that an offer of financial instruments does not qualify as such (Explanatory Report, page 21). However, not every

employee of a financial service provider is deemed a client adviser. Employees who have no direct contact with clients or who support the provision of financial services only to a minor extent, *e.g.* by sending product information to a client in response to an expression of interest, coordinating meetings or working in technical support functions, have no duty to register (Dispatch FinSA, page 8948). In this context, it remains to be seen how persons who have contact with clients under the direct and ongoing supervision of a client adviser, such as a financial analyst providing specialist advice in a meeting conducted by a client adviser will be treated.

The final version of the FinSO clarifies though that corporate finance experts, who advise a company in an IPO in Switzerland, for example, will not fall in the scope of the new rules (*see* article 3(3)(a) FinSO; Explanatory Report, page 19 f.) as long as they do not provide investment advice or other financial services pursuant to article 3 (c) FinSA at the same time.

b) Scope

Only client advisers who are not acting for a financial service provider that is prudentially supervised in Switzerland need to register, regardless of whether they carry out their business in Switzerland or from abroad or whether they are dealing with retail or professional clients (Dispatch FinSA, page 8918 and 8967). The requirement that all client advisers would have been obliged to register in the register of advisers proposed in the consultation draft of the FinSA (*see* article 29 of the consultation draft) has been dropped after criticism during the consultation process.

The Federal Council may exempt certain foreign client advisers from the scope of the registration duty (article 28 (2) FinSA). Whereas the draft ordinance only foresaw a very narrow exemption for client advisers of prudentially supervised foreign financial service providers that are members of a financial group which is subject to consolidated supervision of FINMA if they provide their services in Switzerland exclusively to professional clients (including institutional clients) (article 31 draft FinSO), the Federal Council opted for broadening this exemption in the final version of the ordinance. Following criticism in the consultation proceedings, it extended the exemption from the registration duty to all client advisers of foreign financial service providers who are subject to prudential supervision in their home country provided they exclusively provide financial services to professional or institutional clients in the final version of the FinSO (article 31 FinSO).

Consequently, only client advisers of foreign financial service providers who are either not prudentially supervised in their home jurisdiction or who provide financial services to retail clients will be required to register in the Swiss register of advisers if they provide financial services on a cross-border basis.

The FinSO does not condition this exemption on the equivalence or adequacy of the prudential supervision in the home country of the foreign financial service provider. While this will decrease the administrative burden related to registration, it does not exempt foreign financial service providers from complying with the regulatory framework in Switzerland. Indeed, they will need to comply with the FinSA and ensure that they follow the Swiss rules of conduct and have an appropriate organization. Further, foreign financial service providers are required to join an ombudsman's office even if they are subject to similar duties abroad or provide services to institutional and professional clients only which generally do not relay on the a proceeding before an ombudsman.

3) Requirements for Registration

Client advisers will only be registered in the register if they meet the conditions of article 29 FinSA. According to this provision, they must prove that they have sufficient knowledge of the rules of conduct set out by the FinSA and the necessary expertise to perform their duties, that they have adequate insurance coverage or equivalent financial guarantees and that they (in their capacity as a financial service provider or the financial service provider for which they act) are affiliated to an ombudsman's office (*see* article 74 FinSA).

The liability insurance must cover damages resulting from a breach of the statutory obligations set out in the FinSA of at least CHF 500,000 per year. Coverage must be increased in several steps for additional client advisers to a maximum of CHF 10 million if a financial service provider employs more than 10 client adviser (article 32 (1) – (3) FinSO). Additional contractual liabilities to the client can be excluded from the insurance coverage (*see* Explanatory Report, page 34). Alternatively, a financial guarantee in the same amount must be deposited with the consent of the registration body with a Swiss bank. For prudentially supervised foreign financial service providers, a minimum capital equivalent to at least CHF 10 million is considered adequate as a financial surety (article 33 FinSO). If a client adviser is employed by a financial service provider, the latter can arrange for the insurance coverage or the financial guarantee (article 29 (3) FinSA).

Article 29 (2) FinSA further requires client advisers to prove that they have not seriously breached the rules of conduct in the past by providing an extract from the register of criminal records to the registration body. Client advisers who have been convicted of offenses pursuant to article 89-92 FinSA (*e.g.*, by providing false information or withholding material facts in connection with the information duties of article 8 FinSA, seriously violating the duties to assess appropriateness and suitability pursuant to article 14 ff. FinSA or violating the provisions regarding compensations from third parties in article 26 FinSA), article 86 of the Insurance Supervision Act or offences against property will not be entered into the register. This also applies to persons that have been banned from acting in a management capacity of a financial institution or from trading

in financial instruments or acting as a client adviser (articles 33 and 33*a* of the Financial Market Supervision Act).

4) Registration Body

The register of advisers will be maintained by one or more privately organized registration bodies, which will have to be licensed by FINMA (article 31 (1) and (2) FinSA). The registration body must have its domicile in Switzerland and must be organized in a way to ensure independence in fulfilling its tasks. For this purpose, the register must implement adequate internal rules to prevent, *inter alia*, conflicts of interests of the persons concerned with the management and an internal control system ensuring compliance with the FinSA and the implementing ordinance (articles 36 ff. FinSO; Explanatory Report, page 37 f.).

Earlier this year, BX Swiss AG announced that it will apply for being licensed as registration body. Further, it is expected that at least one additional registration body also intends to file a license application.

In case FINMA approves more than one registration body, FINMA must ensure appropriate coordination between them with respect to their practice (article 35 (4) FinSO).

5) Content of the Register

As minimum content, the register entry must include at least the name and the business address of the client adviser, its position within the financial service provider and its fields of activity, information about education and completed trainings, the name of the ombudsman's office to which it is affiliated and the date of the register entry. This basic information allows clients to verify that their client adviser has the required knowledge and skills. In case of a dispute between the financial service provider and the client, the register entry also permits the latter to identify the competent ombudsman to initiate a mediation proceeding pursuant to article 74 ff. FinSA (*see* Dispatch FinSA, page 8968).

6) Maintaining the Register and Notification Duty

The registration body verifies that the requirements for registering a client adviser are met and issues a decree (in the sense of article 5 of the Administrative Procedure Act (APA)) confirming the registration (article 32 (1) FinSA). Registered client advisers and the financial service providers for which they work must notify the registration body of all changes that are relevant for the registration (including changes of the affiliation with the ombudsman's office, a termination of the liability insurance, convictions for relevant criminal offences or a ban by FINMA from an activity in the financial industry or similar foreign measures) within 14 days (article 32 (2) FinSA and article 41 FinSO).

Further, client advisers have to renew their registration every 24 months. Otherwise, the registration will be deleted from the register (article 41 (2) FinSO).

If the registration body becomes aware that the registration requirements are no longer met, it will issue a decree and remove the respective client adviser from the register (article 31 (4) FinSA). The adviser may consequently no longer engage in activities as a client adviser. The decree of the registration body is subject to appeal to the Federal Administrative Court.

7) Applicable Rules of Procedure and Registration Fees

The procedure for the registration is governed by the APA (article 34 FinSA). If the registration body approves a registration of a client adviser, it is not required to provide a reasoning (article 35 (3) APA). However, if it rejects the registration without providing the applicant the possibility to amend the application, the applicant has a right to be heard (article 30 (1) APA; Dispatch FinSA, page 8970).

To cover the operating expenses, the registration body may charge cost-covering fees in line with the general principles applicable to levy fees by public authorities (article 33 (1) FinSA; Dispatch FinSA, page 8970). For first time registrations, the fee will amount to CHF 500-2,500. A renewal of an existing entry in the register will cost CHF 200-1,000. For urgent requests, a 50 percent surcharge may be applied (article 42 (2) and (6) FinSO). In addition, a registration body may charge an annual fee to cover its running costs (article 42 (1) FinSO).

8) Breach of Registration Duty

A breach of the registration duty may trigger administrative measures by FINMA pursuant to articles 31 ff. of the Financial Market Supervision Act (FINMASA) or the respective person may become criminally liable pursuant to article 44 FINMASA.

9) Transition Regime

Client advisers who have to register pursuant to article 28 FinSA will have until 1 July 2020 to file their application with the registration body (article 95 (2) FinSA). If on 1 January 2020 (upon the entry into force of the FinSA), no registration body will have been approved, the six month period to register will only start with the authorization of the first such registration body by FINMA. The deadline will be met with the filing of the application for being registered (article 107 FinSO).

10) Outlook

Overall, the registration duty will affect non-regulated Swiss financial service providers and, in particular, foreign financial institutions that are not prudentially supervised in their home jurisdiction or, if they are subject to supervision, which also provide financial

services to retail clients in Switzerland and currently offer financial services or products to Swiss clients. Going forward, such foreign financial service providers can no longer rely on Switzerland's current liberal inbound cross-border regime and will be required to either register their client advisers in the register of advisers or establish a regulated subsidiary in Switzerland and.

The scope of the registration duty, however, is not entirely clear yet. While the final version of the FinSO clarified that corporate finance experts, who advise for example a company in an IPO in Switzerland, will not fall in the scope of the new rules as long as they do not also provide investment advice or other financial services, the situation with regard to the activities of distributors of collective investment schemes, for instance, is less clear. Activities that are directed at specific clients aiming specifically to sell or purchase securities, such as a roadshow in which foreign collective investment schemes are advertised, also constitute financial services pursuant to the FinSA and, thus, the persons providing such services on a cross-border basis will need to be registered in the register of advisers. It remains to be seen, however, whether certain other services, for instance relating to roadshows and similar activities, constitute a financial service under the FinSA considering the fact that an offer of financial instruments does not qualify as such.

With the entry in force of the FinSA and the FinIA, together with their implementing ordinances, on 1 January 2020, client advisers will have six months until 1 July 2020 to register if a registration body is authorized upon entry in force of FinSA and, otherwise, six months from the authorization of a registration body (article 95 (2) FinSA and article 107 FinSO).

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Funds Distribution under the new financial market law architecture

Reference: CapLaw-2019-56

On 1 January 2020, the new Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) will enter into force. This entails various changes of existing regulatory concepts in the context of distribution and management of collective investment schemes. From today's CISA perspective, the term "distribution" under Art. 3 CISA plays a fundamental role. Under the new regulatory regime, an exclusive focus on the new concept of the offer falls short in explaining the rules governing the distribution of funds. Particularly with regard to the behavior at the point of sale, the concept of financial services is of primary importance.

By Diana Imbach Haumüller / François Rayroux

1) Introduction

a) The new financial market law architecture

On 1 January 2020, the new Financial Services Act (FinSA) and the Financial Institutions Act (FinIA) will enter into force and will subject, as a result of this legislative change, the existing financial market law architecture to sweeping reforms. Today, the management and distribution of collective investment schemes are governed by the Collective Investment Schemes Act (CISA) and its implementing ordinances, FINMA Circulars as well as SFAMA self-regulations. Under the new legal framework, most of this sectorial regulation will be included into laws, horizontally applicable across sectors, to all financial instruments and financial service providers. This entails various changes of existing regulatory concepts in the context of distribution and management of collective investment schemes.

b) Impact of the new legal framework on collective investment schemes

The CISA currently governs three different areas: (i) the licensing and supervision of financial institutions in relation to collective investment schemes, (ii) the distribution of collective investment schemes and (iii) the approval of collective investment schemes as well as other product-specific rules relating to collective investment schemes.

i. Licensing and supervision of financial institutions

Under the new financial market legislation architecture, the licensing and supervision of fund management companies and fund managers will be governed comprehensively by the FinIA. The corresponding provisions are to be largely transferred unchanged from the CISA. Fund managers and external managers of pension funds will be collectively known as “managers of collective assets”.

ii. Distribution of collective investment schemes

The rules regarding the distribution of collective investment schemes, as well as the related rules for the provision of financial services, will be governed by the FinSA. This means, among other things, that the current term “distribution” (Art. 3 CISA) will be abandoned in favor of the “offering”, the provision of a “financial service” respectively (see chart below). This implies fundamental changes. In particular, distributors will no longer require a FINMA license. However, this will be offset by a new prudential supervision of all asset managers, as well as by the registration requirement for client advisers under the FinSA. Ultimately, the FinSA will impose the obligation to comply with a set of rules of conduct at the point of sale in connection with all financial instruments and services. The corresponding CISA rules (Arts. 10 and 20 et seq. CISA) will therefore be limited to product-specific aspects and cease to impose specific fund related conduct and organizational rules at the point of sale. Rules pertaining to product

documentation, *i.e.* the prospectus requirement and the rules on the production of a KID for retail clients, will also essentially be governed by the FinSA.

iii. Approval of collective investment schemes and other product specific rules

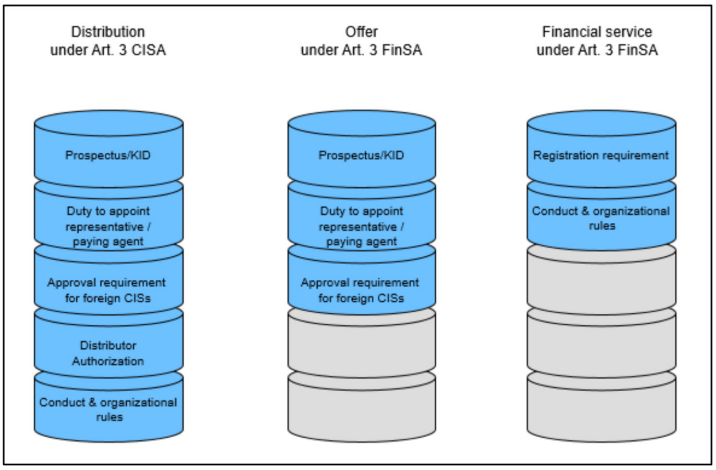
Only product-specific rules will remain in the CISA. This includes rules on contractual investment funds, which constitute the vast majority of Swiss funds, SICAVs, SICAFs, limited partnerships for collective investments as well as the duty to obtain approval from FINMA for foreign funds offered to non-qualified investors in Switzerland, and the duty to appoint representatives and paying agents. With the introduction of the FinSA and the FinIA, a significant change will be the limitation of the obligation to appoint a Swiss representative and paying agent to collective investment schemes targeting investors that are not "per se" qualified investors.

c) The abolition of the term "distribution"

Under today's CISA, the term "distribution" under Article 3 CISA plays a fundamental role (for a detailed discussion of the term "distribution", see Imbach/Rayroux, Funds distribution under FinSA/FinIA: A change of paradigm, CapLaw 5/2018, p. 42 et seqq.)

On the one hand, this notion is relevant to assess whether the product-specific approval requirements for foreign collective investment schemes (Art. 120 CISA) and the duty to appoint a representative and a paying agent (Art. 120 para. 4 CISA) apply. Further, the requirement to provide certain fund documents, such as a prospectus or a KID, is closely linked to the term "distribution" or "distribution to non-qualified investors", respectively. All these aspects will be governed by the definition of the term "offering" under Article 3 let. g FinSA in the future. On the other hand, today, the term distribution also triggers the application of the conduct and organizational rules of the CISA, as well as the duty to obtain a distributor license from FINMA. In the future, these aspects will be governed by the new concept of "financial service". The definition of this term under Article 3 let. c FinSA will be essential to determining whether the organizational and conduct rules of FinSA apply as well as whether the affiliation with an Ombudsman and the registration in the new client advisor registry are required

Against this background, it becomes obvious that an exclusive focus on the new concept of the offer falls short in explaining the rules governing the distribution of funds under the new regulatory framework of FinSA. In particular with regard to the behavior at the point of sale, the concept of financial services is of primary importance.



Source: SFAMA

d) Challenges and perspectives

It was a conscious choice of the legislator to abolish not only the conduct and organizational rules deriving from the concept of a distribution under CISA, but also the distributor license under Art. 13 para 2 lit. g CISA. Based on the explanations above under section c), this only makes sense from a CISA perspective if a number of circumstances, which today constitute a distribution of funds, are classified as a financial service under FinSA, even where such circumstances do not imply a transaction-related advice. One has also to see the need for this construction of the concept of a financial service against the background of the abolition of the obligation to appoint a representative in dealings with "per se" qualified investors (Art. 120 para. 4 CISA) which is responsible for ensuring that foreign fund providers and distributors comply with the rules of conduct. In other words, the aim was not to create a gap in the existing rules for the protection of investors, but to ensure that the discontinued CISA rules shall be adequately integrated in the new FinSA regulations. This was the main driver of the authors of the legislative texts specified in Article 3 para. 1 of the FinSO draft from October 2018 and thereafter in Article 3 para. 2 of the final version of FinSO together with and explanatory comment in the final Explanatory Report of the Federal Finance Department, p. 19 (Explanatory Report).

However, since FinSA applies not only in the context of collective investment schemes, but to all financial instruments and financial services according to FinSA, it was particularly important to consider specific aspects in relation with other financial instruments and services. Against this background, the definitions of the concept of a financial service, as well as of the offer, were narrowed and specified in the final version of FinSO in line with the intent of the legislator not to introduce a new financial markets regulation which is more stringent than necessary to ensure an appropriate level of

investor protection considering existing regulation. Therefore, the FinSO expressly clarifies among others that any advice in relation to financing or capital market transactions, as well as M&A activities and related services, do not constitute financial services within the meaning of Article 3 let. c FinSA (Article 3 para. 3 FinSO) (for further details see section 2) below).

Moreover, from a CISA perspective, a few clarifications were important (for an extensive overview see SFAMA's and Lenz & Staehelin's responses during the consultation process for FinSO and FinIO). One of the most important was the clarification under Article 3 para. 2 FinSO that, in order to be characterized as a financial service according to Article 3 let. c ciph. 1 FinSA, there must be a contact of a financial services provider with an end-investor. Hence, the provision of information on financial instruments to supervised financial intermediaries is generally not regarded as a financial service within the meaning of this provision (see Explanatory Report, p. 19).

2) Fund distribution as a financial service

a) Financial Services

i. Definition

Article 3 let. c ciph. 1 FinSA includes a conclusive list of financial services, namely (1) acquisition or disposal of financial instruments, (2) receipt and transmission of orders in relation to financial instruments, (3) administration of financial instruments (portfolio management), (4) provision of personal recommendations on transactions with financial instruments (investment advice), and (5) granting of loans to finance transactions with financial instruments. As mentioned above, from a fund perspective, it is clear that many circumstances, which today constitute a distribution of collective investment schemes, are to be characterized as a financial service pursuant to Article 3 FinSA. In addition, the Dispatch of the Federal Council, dated 4 November 2015, stated that "classic" fund distribution - outside of an advisory or asset management agreement - must also be characterized as a financial service (see Dispatch FinSa/FinIA, pages 8922, 9010 and 9050).

Unfortunately, the Federal Counsel did not further specify under which of the activities mentioned under Art. 3 let. c FinSA such fund distribution would fall, leading to discussions on whether the distribution of funds will no longer be regulated, *i.e.*, not be covered at all by the conduct rules and the obligation to register as a client advisor under the FinSA. Against this background, the draft FinSO and the first draft of the Explanatory Report clarified from the outset that the term of a "purchase" or "sale" of financial instruments pursuant to Article 3 let. c ciph. 1 FinSA goes beyond circumstances in which there is an effective purchase or sale of a financial instrument. It further made clear that this concept also includes any activity in relation thereto, such as any other action which specifically aims at the purchase or sale of a financial instruments. Such a

definition also covers circumstances in which no advice is given to the client, whether transaction-based or in a general form (see Art. 3 para 1 FinSO and Draft Explanatory Report, page 18).

In the first draft of the Explanatory Report, the FDF had stated that the new rules would include any act of "intermediation". Since the meaning of the term "intermediation" used in the draft version of Article 3 para. 1 FinSO (todays' para 2) was not precise enough, it has been removed in the final version of Article 3 para 2 FinSO. This article and the Explanatory Report now clarify that "the acquisition or disposal of financial instruments within the meaning of Article 3 letter c ciph. 1 FinSA is deemed to cover any activity addressed directly to certain clients that is specifically aimed at the acquisition or disposal of a financial instrument". In practice, this will include interactions of financial services providers with specific clients which, based on an assessment of the circumstances, must be considered, potentially or actually, as an important element, or "cause", to take a specific investment decision.

It seems therefore clear that a contact with an "end investor" is an essential prerequisite for an activity to be characterized as a financial service in the sense of Art. 3 para. 2 FinSO. Against this background, it is very helpful that the Explanatory Report now specifies that the provision of information on financial instruments to supervised financial intermediaries is generally not regarded as a financial service within the meaning of this provision (see Explanatory Report, p. 19). This would only be the case if a financial intermediary exceptionally acquired a financial instrument for its own account (*i.e.*, nostro). This differentiated approach corresponds to the current legal situation (Art. 3 para. 1 CISA) and has proven its merits, as it takes into account the need for protection of end customers without, at the same time, unnecessarily complicating the access of Swiss financial intermediaries to financial instruments, implying the risk of reducing the market for financial instruments in Switzerland, which was clearly not the intent of the legislator. In these cases, the financial services mainly triggering the rules of conduct, take place downstream between the financial intermediary and its clients (see the Explanatory Report, which refers explicitly on page 19 to the required prudential supervision of the respective financial intermediaries).

Whether roadshows should be considered as financial services depends on the specific circumstances of each case. In light of the fact that an activity is only deemed to constitute a financial service in the sense of Article 3 para. 2 FinSO if a certain potential end-investor is addressed directly, specifically aiming at the acquisition or disposal of a specific financial instrument by such client, roadshows will, in many cases, not be characterized as a financial service. However, roadshows will, in other cases, constitute an offer or at least an advertisement for a financial instrument. A roadshow would only constitute the provision of a financial service if, at such an event, specific potential end-investors are additionally approached for the acquisition of a specific financial

instrument (for further details see section b) let. i)). In some cases, there might be a thin line between activities constituting only an offer and those which may also be characterized as a financial service. With the new financial market architecture however, those are two independent concepts. Against this background, the general reference to roadshows in the Explanatory Report (see p. 18 seq.) appears to be unfortunate.

ii. Consequences

Article 3 para. 2 FinSO now clarifies under which circumstances the distribution of collective investment schemes is deemed to constitute a financial service under FinSA. If a certain activity is deemed to be a financial service, and only then, mainly the following obligations are triggered: (1) client segmentation (Art. 4 et. seq. FinSA), (2) conduct rules (Arts. 7-19 FinSA), (3) organizational rules (Arts. 21-27 FinSA), registration in the register of advisers (Arts. 28-34 FinSA) and (5) affiliation with an Ombudsman (Arts. 74-86 FinSA).

If financial services are only targeted at professional clients, including institutional clients, according to Article 4 seq. FinSA, certain exemptions to the conduct rules mentioned above and the requirement to register in the registry of advisors may apply:

– According to Article 20 para. 1 FinSA, the provisions of Articles 7-19 FinSA (conduct rules) do not apply to transactions involving institutional clients.

– According to para. 2 of the same article, professional clients may expressly release financial service providers from applying the code of conduct obligations set out under Articles 8, 9, 15 and 16 FinSA.

– Furthermore, financial services providers may assume that professional clients have the necessary knowledge and expertise as well as the capability to assume the financial risks of a specific financial instrument or service (Art. 13 para 2 FinSA).

– With the new Article 31 FinSO, client advisers of foreign financial service providers, which are prudentially supervised abroad, are exempted from the duty to register in the new registry, if the services they provide in Switzerland are exclusively aimed at professional clients, including institutional clients. It is interesting to note however, that this exemption generally does not apply to client advisers of Swiss based companies of the same group.

b) Delimitations

i. Offer vs. financial service

From today's CISA-perspective, all activities which would constitute a financial service, an offer or advertisement should, in many cases, be considered as distribution according to Article 3 of the existing CISA. However, with the new financial market law

architecture entering into force on 1 January 2020 the notions of the financial service, the offer as well as the advertisement for financial instruments and services are three independent concepts. In order to understand how the distribution of funds will be regulated in the future, the difference between these concepts is of fundamental importance.

The term of the offer is defined in Article 3 let. g FinSA as "any invitation to acquire a financial instrument that contains sufficient information on the terms of the offer and the financial instrument itself". As this definition is not self-explanatory, Article 3 para. 5 and 6 FinSO specify the offer in more detail in both a positive (para. 5) and negative (para. 6) manner.

First, paragraph 5 clarifies that an offer requires a communication of any kind containing (a) "sufficient information on the terms of the offer and the financial instrument" and which (b) "is customarily intended to draw attention to a certain financial instrument and to sell it". According to the Explanatory Report, this definition in FinSA relies essentially on the definition of the offer under the Swiss Code of Obligations (CO) (see Explanatory Report, p. 20). However, the statement in the Explanatory Report pursuant to which the concept of the offer according to the CO must not simply be understood to apply in any instance where the new legislation refers in general terms to the terms "offer" or "offered", e.g. in the context of the offering of structured products (Art. 70 para. 1 FIDLEG) or in the context of the approval requirement for foreign collective investment schemes according to Art. 120 CISA, is rather unclear (see Explanatory Report, p. 21). It can therefore only be understood as clarifying that there is a difference between an offer and the issuance of financial instruments from a technical point of view, which would be clear even without this statement. In any case, we are of the view that only a uniform application of the concept of an "offer", wherever the new legislation triggers legal consequences as a result of the existence of an offer, may achieve the required legal certainty and uniformity in the application of the new legislation.

Finally, paragraph 6 of Article 3 FinSO enumerates constellations which do not constitute an offer. Besides the clarification with respect to making factual information available and the mentioning by name of certain financial instruments, the new specification in the FinSO pursuant to which the fact of making information available at a specific request or initiative of the client without prior advertisement, does not constitute an offer, is the most important clarification in our view. This amendment to FinSO is based on requests from the Fund and Asset Management industry during the consultation process (see amongst others SFAMA's response in the consultation process). It takes up the current legal situation in Article 3 para. 2 let. a CISA regarding the product-related "reverse solicitation". This "reverse solicitation" in the specific context of an "offer" must be clearly distinguished from the new regulations on the reverse solicitation in the context of financial services, which are laid down in Art. 2 FinSO and are

strictly limited to cross-border circumstances. However, there are good reasons to argue that making information available at the sole request or initiative of the client, without an additional interaction conducted by the service provider, does not constitute a financial service according to Article 3 let. a ciph. 1 FinSO as it must not be considered as the "cause" to take a specific investment decision (see above section 2)let. a)let. i). This would also be in line with the mentioned provision in Article 3 para. 2 let. a of the existing CISA.

Unlike the term of financial service, which triggers the point of sale related obligations, such as conduct and organizational rules and the requirement for registration in the register for advisers, the characterization as an offer is mainly relevant, on the one hand, for the requirement to publish a prospectus and a KID and, on the other hand, with respect to fund specific obligations. Most importantly, a foreign collective investment scheme only needs FINMA approval if it is offered to non-qualified investors according to CISA. The same applies essentially with respect to the appointment of a representative and a paying agent when a product is to be offered to investors other than "per se" qualified investors. Hence, from a fund perspective, the notion of the offer is primarily relevant with respect to non-qualified investors under the CISA. With respect to qualified investors, the qualification as an offer triggers hardly any consequences.

ii. Advertisement vs. financial service

Article 95 FinSO clarifies that any communication which is aimed at investors and serves to draw attention to specific financial services or financial instruments is deemed to constitute advertising within the meaning of Article 68 FinSA. It further outlines circumstances in para. 2 which do not constitute advertisement, such as the mentioning by name of financial instruments, the provision or forwarding of communications from issuers and reports in the trade press. This indicates that the scope of application of the term advertisement according to the FinSA is narrower than under the existing CISA-regime.

Similar to the offer as described above, advertisement hardly trigger any requirement for "per se" qualified investors according to the CISA. Unlike for other financial instruments, where no product specific approval requirement exists, an advertisement triggers the product specific approval requirements, as well as the obligation to appoint a representative and a paying agent, according to Article 120 para. 1 and 4 CISA. A corresponding specification in a new Article 127a CISO has been added in the final version of the updated CISO to ensure that the special statutory obligations of the CISA will not be undermined by the FinSA as a result of an advertisement to non-eligible target investors. This is also in line with the remaining provisions of CISA and CISO, such as, in particular, Art. 133 para. 2 CISO. By contrast, in respect of financial instruments other than collective investment schemes, the initially proposed Article 95 para. 3 of the draft version of FinSO has now been suppressed from the final version of the

ordinance. The fact that some of the original commentary of this norm in the draft Explanatory Report can still be found in the final version of this report could, however, lead to some uncertainty with respect to other financial instruments.

3) Transitional provisions

An important part of the final version of the FinSA from a CISA perspective are the transitional provisions, particularly Articles 105 and 106 FinSO. On 1 January 2020, the new regulatory regime enters into force. Consequently, many provisions of the CISA, including the definition of the concept of "distribution" and "non-distribution" (Art. 3 CISA), as well as the conduct and organizational rules at the point of sale (Art. 20 et seqq. CISA), will cease to exist. The requirement to obtain a distributor's license and to conclude a distributor's agreement will also disappear. However, with the transitional provisions provided for in Article 103 et seqq. FinSO, the effective date of practically all new FinSA requirements, in particular the conduct and organizational rules, will be pushed back until 1 January 2022. As for the obligations to register with the registry for advisors and to be affiliated with an Ombudsman, there is a transitional period of six month from the moment the registry, or the Ombudsman, have been approved by FINMA or the FDF, respectively.

As the existing CISA rules at the point of sale will cease to exist by the end of this year, but the effective date of the new equivalent rules of FinSA will be pushed back for another two years, there is a time gap with respect to the conduct and organizational rules at the point of sale and a risk of legal insecurity. Against this background, the transitional provisions of the final version of FinSO provide for a phasing out of some of the current CISA rules over the course of two year. It is interesting to note that those transitional provisions also apply to financial services providers entering the Swiss market after 1 January 2020 (See Explanatory Report, p. 68), which, in our view, seems very unusual.

With Article 105 and 106 para. 3 FinSO, financial service providers are subject to the existing rules of conduct and organizational provisions according to Article 20 – 24 CISA (as per 31 December 2019), until they comply with the new provisions of FinSA. This includes not only compliance with CISA and its implementing ordinance CISO, but also with the relevant SFAMA self-regulations. Consequently, this also means that the existing regulatory requirement to conclude distribution agreements remains in place. This further explains why the current requirement for foreign collective investment schemes to appoint a representative and a paying agent irrespective of whether the funds are distributed to qualified or non-qualified investors continues to apply until a financial service provider fully complies with FinSA. Without these requirements, the current concept of distribution agreements, the representative being a party of such agreements, would not work.

It is to the discretion of each financial service provider to decide when they will comply with the new FinSA regulation. However, according to para. 2 of Article 105 and 106 FinSA, financial services providers implementing the new rules before the end of the transitional period must inform their audit firm. This creates clarity as to which supervisory regime applies to the respective financial service provider (see Explanatory Report, p. 69). Against this background it seems clear to us that this reporting obligation can only apply for financial service providers required to undergo prudential audits in Switzerland either based on prudential supervision or a distribution agreement in the sense of Article 24 para. 2 CISA (as per 31.12.2019) in conjunction with Article 105 and 106 para. 3 let. d FinSO. From a practical point of view, to terminate the distribution agreement required by the current version of CISA once a financial service provider complies with FinSA, a formal notice to the parties of the distribution agreement, *e.g.* the representative for foreign funds, is in our view further required.

Even though existing CISA rules on conduct and organization at the point of sale will remain in place until a specific financial service provider decides to comply with the new FinSA rules, all remaining changes of the CISA, such as the abolition of the term distribution, will be effective on 1 January 2020. This can lead to peculiar situations in which an existing regulation based on the term distribution remains applicable, but adapted to the new concept of a "financial service". In particular at the intersection between the new law and the existing CISA provision, such as client segmentation, special caution with regard to necessary measures to be implemented by the end of 2019 is required. However, even though this approach appears to be somewhat unconventional, from the perspective of the investors' protection, but also from the perspective of the industry, it should be the least disruptive given the decision of the legislator to favor an ongoing continuous implementation of the new financial market architecture as regards the FinSA rules of conduct and organization over a relative long period of two years.

4) Conclusion

The FinSA and the FinIA will, with their entry into effect on 1 January 2020, materially change the existing financial regulatory concepts in Switzerland, in particular in the context of the distribution and management of collective investment schemes. This being said, it is to be noted that the interaction of the new concepts of a financial service, an offer of and advertisement for financial instruments or services leads in practice to more flexibility as compared to the existing single test under Article 3 CISA of a "distribution" of collective investment schemes. This will allow financial promotors to implement in their placement activities a differentiated approach, in particular in circumstances which today constitute a distribution and where contacts with end-investors are subject to the stringent and inflexible regulations under Article 3 CISA.

With the new financial market law architecture, only when a certain activity is deemed to constitute a financial service, and only then, the new FinSA obligations at the point of sale, such as conduct and organizational rules or the requirement to register in the new register for advisors, are applicable. As the existing CISA rules at the point of sale will cease to exist by the end of this year, but as the effective date of the new equivalent rules under FinSA will as a matter of facts be pushed back for another two years, transitional provisions have been added to the final version of the ordinance. Generally speaking existing CISA rules on conduct and organization will continue to exist until a financial service provider fully complies with the new FinSA. This will lead to an implementation phase where, as a matter of fact, there will be a number of gray zones and uncertainties. This seems however to be accepted by the legislator, in particular at the intersection between the new law and the existing CISA provision, such as for the purpose of implementing the new client segmentation. In this respect, a special attention needs to be paid to the necessary operational measures which are required for a timely implementation of the categorization of existing non-qualified investors, who as a matter of law will be characterized with the entry into effect of FinSA as qualified investors.

All in all, these fundamental legislative changes in Switzerland will bring a welcome additional flexibility, in particular with a view of enhancing the competitiveness of Switzerland as a financial market place, mainly where institutional or professional investors are contacted. This holds in particular true for the cross-border offer of financial instruments or services as a result of the conscious choice of the legislator to waive the registration requirement for prudentially supervised foreign financial services providers. This must be seen as a clear sign of openness of Switzerland towards other jurisdictions.

The content of this article is the personal opinion of the authors. This opinion is not necessarily identical with the position of Lenz & Staehelin or SFAMA.

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CapLaw
SWISS CAPITAL MARKETS LAW

Something Old, Something New: The Supervision of Financial Institutions under the Federal Act on Financial Institutions – FinIA Cleared for Takeoff

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On 1 January 2020, the Federal Act on Financial Institutions of 15 June 2018 (FinIA) will enter into force together with the Federal Act on Financial Services (FinSA). The FinIA revises the regulatory architecture for financial institutions. Instead of the current sectorial approach, the FinIA proposes to introduce a regulatory pyramid with a light regulatory framework for asset managers and trustees, and an increasingly more stringent regime for managers of collective assets, securities firms – the new denomination for securities dealers – and, at the top, banks, although they will be continue to be governed by the Federal Act on Banks and Saving Banks of 8 November 1934 (Banking Act, SR 952.0) and remain out of scope of the FinIA. Furthermore, the FinIA introduces several new regulatory regimes: it subjects portfolio managers and trustees to prudential supervision and extends the current regime applicable to asset managers of collective investment schemes to asset managers of pension funds. Moreover, it recasts the existing regime applicable to securities dealers under the Federal Act on Stock Exchanges and Securities Dealing of 24 March 1995 (SESTA, SR 954.0) into a slightly modified new regime for securities firms. This article updates the previous versions now that the Federal Council passed the Ordinance on Financial Services of 6 November 2019 (FinSO) and the Ordinance on Financial Institutions of 6 November 2019 (FinSO)

By Rashid Bahar

1) Financial Institutions: Definition and Scope

The FinIA governs the regulatory framework applicable to five types of financial institutions: (a) portfolio managers; (b) trustees; (c) managers of collective assets; (d) fund management companies; and (e) securities firms.

a) Portfolio Managers and Trustees

Portfolio managers are defined as whoever can, on a commercial basis dispose of the financial assets based on a mandate in the name and on behalf of clients (article 17 (1) FinIA). Trustees are defined as whoever can on a commercial basis manage or dispose of a separate fund based for the benefit of the beneficiary or a specific purpose on the basis of an instrument establishing a trust as defined in the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition (article 17 (2) FinIA). Portfolio managers and trustees will be deemed to act on a commercial basis if their activity generates a gross revenue of more than CHF 50,000; if they have at any given point more than 20 long-term contractual partners or if they have in a given calendar year more than 20 such relationships; or if they have the power to dispose over assets worth more than CHF 5 million (article 19 (1) FinIO).

b) Managers of collective assets

Managers of collective assets are defined as whoever manages on a commercial basis assets in the name and on behalf of collective investment schemes and occupational pension schemes (article 24 (1) FinIA). The FinIA provides for a *de minimis* exemption and provides that the licensing requirements as managers of collective assets apply only if the quantitative thresholds set in article 24 (2) FinIA are exceeded. Otherwise, only a license as portfolio manager will be required. As a matter of principle, the regime for managers of collective assets is based on the current regime for managers of collective investment schemes. However, its scope is broader since it will also cover asset managers who act in the name and on behalf of pension schemes. In this context, the FinIA exempts occupational pension schemes, including so-called employer sponsored funds, as well as employers, who manage the assets of their occupational pension schemes and employer and employee unions, who manage their assets (article 3 (2)(f) FinIA).

c) Fund Management Companies

Fund management companies will continue to be responsible for the management of investment funds in their own name, but for the account of investors (article 32 FinIA) and be subject to fundamentally the same regulatory framework as under the Federal Act on Collective Investment Schemes of 23 June 2006 (CISA, SR 951.31). As is currently the case, they will be allowed to custody and administer units of collective schemes and administer SICAVs (article 34 FinIA). Strictly speaking these activities constitute ancillary businesses that do not trigger the license requirement (and the right to obtain a license), although the latter activity is reserved to fund management companies (*see* article 51 (5) CISA as amended by the FinIA). Nevertheless, the FinIO assumes that FINMA will need to entertain requests for a license as a fund management company for persons only seeking to administer SICAVs (*see* article 49 (2) FinIO).

d) Securities Firms

The same issue arises with securities firms (the new terminology for securities dealers under the SESTA): the FinIA defines securities firms as whoever, on a commercial basis, trades securities in its own name but on behalf of clients (article 51 (a) FinIA), trades in securities for its own account on a short-term basis, operates primarily on the financial market and can endanger the proper functioning of the financial market or participates in a trading venue (article 51 (b) FinIA) or trades in securities for its own account on a short term basis and quotes a price for specific securities publicly on an ongoing basis or on request (article 51 (c) FinIA). In this context, the activities of underwriters and derivative houses, which triggered a licensing requirement under SESTA, strictly speaking do not create a right to apply for a license under the FinIA although they are reserved to banks and securities firms pursuant to article 12 FinIA.

e) Exemptions

In addition to the usual catalogue of exemptions for, among others, the Swiss National Bank, the Bank for International Settlements (article 2 (e) FinIA), occupational pension schemes (article 2 (f) FinIA), social security institutions (article 2 (g) FinIA, *see also* article 2 (i) FinIA), the FinIA exempts banks under the Bank Act and insurance companies under the Federal Act on the Oversight of Insurance Companies of 17 December 2004 (ISA, SR 961.01) from the scope of the act (article 2 (h) and (j) FinIA). Therefore, banks and insurance companies can, as a matter of principle, carry out all the activities contemplated by the FinIA without requiring a license under the FinIA, with the exception of fund management, which is reserved to fund management companies under the CISA. By contrast, the inventory of exemptions does not mention other insurance companies that are not subject to the ISA, such as cantonal building insurers, who are thus required to obtain a license under the FinIA if they intend to engage in a business covered by the FinIA.

Furthermore, the FinIO exempts trustees and portfolio managers who are controlled by related persons or a trust or a foundation that was established by related persons (article 4 (2) FinIO). The second exemption will allow family offices as well as private trust companies dedicated to a single family to continue to operate without needing to comply with the regulatory burden applicable to financial institutions that serve a broader client base. Notably this exemption will also apply if the trust benefits, in addition to the family, public or general interests. Moreover, the FinIO also provides for the possibility for FINMA to exempt trustees established for a specific person or for the benefit of a given family that are held and supervised by a regulated financial institution from the licensing requirement under the FinIA (article 9 (3) FinIO).

2) Regulatory Pyramid

The FinIA will revise the regulatory architecture governing financial institutions. Instead of the current sectorial approach based on the activity of financial institutions, the FinIA proposes to introduce a regulatory pyramid with a light regulatory framework for portfolio managers and trustees, and an increasingly more stringent regime for collective asset managers, fund management companies and securities firms.

Following this approach, a more stringent license automatically permits the holder to carry out the business of a less stringent entity. Banks will – although they are not subject to the FinIA – allowed to carry out the business of entities with a less stringent license requirements. Specifically, banks will be automatically authorized to engage in the business of a securities house, a manager of collective assets, a trustee or a portfolio manager (article 6 (1) FinIA). Securities firms will be authorized to manage assets of collective investment schemes and pension funds, act as a portfolio manager and trustee (article 6 (1) and (2) FinIA). Collective assets managers will similarly be entitled to engage in “simple” portfolio management (article 6 (4) FinIA).

The pyramid is, however, not complete. First, it branches out for fund management companies; although they will have the right to engage in the business of managers of collective assets and asset managers (article 6 (3) FinIA), banks or securities firms will not be entitled to engage in fund management (article 6 (1) and (2) FinIA *a contrario*). Similarly, only banks and securities firms will be automatically licensed to act as trustees. Fund management companies and collective investment managers will not be authorized to act as trustees although they hold a more stringent license (article 6 (3) and 5 (4) FinIA *a contrario*). Furthermore, trustees will need a supplemental license to act as portfolio managers and vice versa (article 20 FinIO).

Moreover, banks will not be integrated in the regulatory framework defined by the FinIA. They will continue to be the subject of the Banking Act. Furthermore, insurance companies are completely out of scope of the FinIA and the FinSA although they regularly engage in asset management and offer investment products tied with life-insurances. This gap will, however, be closed in connection with the partial revision of Insurance Oversight Act, which was put into consultation on 14 November 2018 by introducing a dedicated regime for insurance companies (*see* Press release of 14 November 2018, Federal Council initiates consultation on partial revision of Insurance Oversight Act, available https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-72921.html)

Finally, the system will not be as elegant as it may seem: several functions under the CISA will continue to require a specific license, even for banks. Banks will continue to need to apply for a specific license to act as a depository bank (article 13 (2) (e) CISA). Banks, securities firms, and managers of collective assets will also continue to need a specific license to act as representatives of foreign collective investment schemes (article 13 (3) CISA and article 8 (1) and (3) of the Ordinance on Collective Investment Schemes of 22 November 2006, SR 951.311).

3) Licensing Requirements and further duties of financial institutions

a) Common Framework for all Financial Institutions

At the heart of the regulatory model lies a set of common provisions that apply to all financial institutions (*see* articles 5 to 16 FinIA, articles 52 to 60 FinIA on branches and representative offices of financial institutions and articles 61 to 67 FinIA on prudential supervision) which are completed by rules that apply specifically to each given type of financial institution (*see* articles 17 to 23 for trustees and portfolio managers, article 24 to 31 for managers of collective assets, articles 32 to 40 for fund management companies, articles 41 to 51 for securities firms).

All financial institutions will be licensed by FINMA (article 5 (1) FinIA). Once licensed, they will be required to announce any change of circumstances underlying their license

to FINMA (article 8 (1) FinIA), and seek the prior authorization of FINMA for fundamental changes (article 8 (2) FinIA), which are defined in the FinIO as changes to the organization and business regulations, changes in the board of directors and executive management, changes to share capital and regulatory capital, facts that are likely to question the ongoing satisfaction of the fit and proper requirement by the institution, its directors, senior management, and shareholders, as well as changes of regulatory auditor or supervisory organization (article 10 FinIO).

As to their substance, the common requirements will be largely modelled on the current regime applicable to banks and securities dealers as applied by FINMA. Namely, all institutions will be required to have an appropriate organization (article 9 FinIA), including risk management and an effective internal control system (article 9 (2) FinIA). The FinIO elaborates further by providing that geographic and business scope of financial institutions will need to be set out in the relevant documents, meaning the articles of incorporation, partnership agreement or the organization and business regulations (article 12 (2) FinIO) and by conditioning any extension of the business activities or the geographic reach to the availability of sufficient resources and an appropriate business organization (article12 (2) FinIO). Through this provision, the FinIO creates a regulatory basis for FINMA to monitor cross-border activities and, to a lesser extent, review the business model of financial institutions.

In line with the current practice of FINMA, both the institution as such and the members of the board of directors and executive management will be subject to a fit and proper requirement, which extends also to their reputation and professional qualifications (article 11 (1) and (2) FinIA). Notably, the FinIO provides detailed professional qualification requirements for so-called qualified senior executives of portfolio managers and trustees (article 25 FinIO), but does not provide specific requirements for other financial institutions. In a positive departure from the stance taken in the consultation, the FinIO defines the requisite qualification as having at least five years of professional experience in the relevant business and a training of at least 40 hours (article 25 (1) FinIO). Furthermore, the FinIO expressly requires portfolio managers and trustees to maintain their skills through regular continuing education (article 25 (3) FinIO).

Qualified shareholders also need to comply with a fit and proper requirement and provide the assurance that their influence will not have a negative effect on a proper and prudent conduct of business (article 11 (3) FinIA). They will, as is currently the case, be subject to a duty to disclose their shareholding prior to reaching or crossing thresholds of 10, 20, 33 and 50 per cent of the shares or capital of a financial institution (article 11 (5) FinIA).

The FinIA further generalizes the rules of the CISA on outsourcing by permitting financial institutions to outsource to third parties only if they have the requisite skills, knowledge and experience and hold the requisite licenses to carry out their business (article

14 (1) FinIA). In this context, the FinIA empowers FINMA to condition the delegation of investment management to persons in other jurisdictions on the existence of an agreement between FINMA and the foreign regulator on cooperation and exchange of information (article 14 (2) FinIA). The FinIO further defines the regulatory framework applicable to outsourcing. It expressly codifies the principle that financial institutions should in any event retain the powers that belong to the executive management and the board of directors (article 16 (1) FinIO) and must continue to have appropriate operations, meaning that they must retain under all circumstances the requisite staff and skills to select, instruct, supervise and manage the risks related to their outsourcing service supplier and have all necessary powers to instruct and control it (article 16 (2) and (3) FinIO). Furthermore, financial institutions will need to document which tasks are outsourced and define the competencies and responsibility of each party, the powers to sub-delegate, the duty to account and control rights of the financial institution (article 17 (2) FinIO). The financial institution will need to define in their organizational framework what tasks are delegated and whether they can be sub-delegated (article 17 (3) FinIO). This term is, however, somewhat ambiguous insofar as it is not entirely clear whether this framework needs to be defined in the business and organization regulations, which are subject to FINMA approval pursuant to article 8 (2) FinIA, or if it is sufficient to address the issue in an internal policy or guideline.

Moreover, the FinIA requires financial institutions to notify FINMA before they establish or close a subsidiary, a branch or a representative office abroad or before they purchase or dispose of qualified participation in a foreign company (article 15 FinIA). This notification will need to include a business plan and further information on the foreign operations, its directors and senior management, its auditors as well as its regulators and supervisors abroad (article 18 FinIO).

Finally, all financial institutions will be required to join an ombuds-organisation upon starting their business (article 15 FinIA). This requirement ensures the effectiveness of the rules on alternative dispute resolution for investor disputes provided for by the FinSA. However, it makes little sense for trustee, who are not subject to the FinSA and do not have clients strictly speaking. Therefore, this legislative mistake is due to be corrected in connection with an upcoming amendment to the FinIA.

The general requirements will, however, be modulated to account for the particular business of each type of financial institution. Therefore, although all financial institutions are subject to an obligation to have an appropriate organization pursuant to article 9 FinIA. The requirements will vary from one type of financial institution to another and must account for the size and complexity of the business when implementing and applying the regulations (*see*, *e.g.*, articles 9 (3) and 20 (2) FinIA, article 43*b* (3) Federal Act on the Swiss Financial Market Supervisory Authority of 22 June 2007 (FINMASA,

SR 956.1)). In parallel, each type of institution will be subject to specific requirements. As the institutions raise in the regulatory pyramid, they become increasingly stringent.

b) Specific Requirements for Portfolio Managers and Trustees

Portfolio managers and trustees enjoy a relatively lenient regulatory framework: for example, qualified shareholders will be expressly allowed to exercise an executive role in a portfolio manager or a trustee (article 11 (8) FinIA). Furthermore, they are exempted from the requirement to announce to FINMA the fact that person took a substantial shareholding or reached or crossed the thresholds of 20, 33 or 50 per cent of the shares or the capital (article 11 (7) FinIA). In terms of governance, the requirements are limited: their executive management must, in principle, consist of two qualified persons with a joint signatory power (article 20 (1) FinIA and article 23 (1) FinIO). The act, however, expressly allows them to have only one qualified person, if they have ensured that business continuity is ensured (article 20 (2) FinIA). Similarly, the FinIA expressly provides that the risk management and compliance functions can be exercised by a duly qualified member of the senior management, another duly qualified member of staff or even delegated to qualified third party (article 21 (2) FinIA). Smaller financial institutions, which have less than five full-time equivalent employees or generate a gross revenue of less than CHF 2 million per annum, will even be entitled to waive the independence requirements for risk management and compliance (article 26 (2) FinIO). At the same time, larger portfolio managers with a gross revenue of more than CHF 10 million may be subject to the obligation to appoint an independent internal audit (article 26 (4) FinIO).

Similarly, portfolio managers and trustees are also subject to fairly limited specific requirements in terms of capital. For example, they will be subject to minimal regulatory capital requirements and be expected to either post collateral or have appropriate professional liability coverage (article 22 FinIA). The ordinance is, however, more lenient and conceives professional liability coverage as a means to meet the own fund requirements (article 31 (2) FinIO). The own fund requirements will amount to 25% of the fixed costs, but no more than CHF 10 million (article 23 (2) FinIA)

c) Specific Requirements for Managers of Collective Assets

Managers of collective assets will be subject to an intermediate regime, which is fundamentally comparable to the existing regime for asset managers of collective investment schemes under the CISA. The FinIA provides only for fairly straightforward specific organizational requirements, which focus on the delegation of duties (article 27 FinIA). By contrast, the requirements regarding organization in the FinIO, which codify the existing practice of FINMA, go well beyond the ones applicable to portfolio managers: managers of collective assets will, as a matter of principle, be required to have a board of directors that is majority non-executive (article 38 (1) FinIO) and composed of

at least a third of independent directors (article 38 (3) FinIO). Furthermore, the chairman of the board is not allowed to act as chief executive officer (article 38 (2) FinIO). Among others, article 39 (2) FinIO expressly requires managers of collective assets who also act as portfolio manager for individual clients (*e.g.*, through so-called managed accounts) to invest in funds they manage only if they have a general approval from the affected clients. Similarly, the requirements regarding risk management and compliance are more detailed (*see* article 41 FinIO).

Managers of collective investments are not subject to full capital adequacy and liquidity requirements. Instead, they are expected to maintain a certain level of capital, post collateral or subscribe a professional insurance policy (articles 28 and 29 FinIA) as well as minimal capital requirements. Based on article 44 (1) FinIO, managers of collective assets will be required to have sufficient own funds to cover 25% of their fixed costs but no more than CHF 20 million. In addition they are also required to hold further capital amounting to 0.01% of the asset under their management unless they have sufficient professional liability coverage (article 44 (2)). However, rules for consolidated supervision requirements kick in at this stage (article 30 FinIA).

d) Specific Requirements for Fund management Companies

Fund management companies are subject to extensive rules, which mirror the existing regime under the CISA. These consist in strict governance requirements: they will need to have a board of directors composed of at least three members (article 52 (1) FinIO), of which the majority are non-executive directors (article 52 (2) FinIO), and include at least a third of independent directors (article 52 (4) FinIO). As with managers of collective assets, the chairman of the board will be barred from being the chief executive office (article 52 (3) FinIO). Moreover, the FinIO contemplates further requirements to ensure that the fund management company is independent from the depository bank. Among others, members of the management of the fund management company cannot be at the same time a member of the management of the depository bank (article 53 (2) FinIO), while directorships within both entities are permissible, as long as a majority of the members of the board are independent from the depository bank (article 53 (1) and (3) FinIO).

In terms of capital requirements, they are required to hold at least CHF 1 million in equity (article 58 FinIO) and comply with own funds requirements calculated on the basis of the assets under management (article 59 (2) and (4) FinIO) and the general framework applicable to banks for operational risks related to the custody and administration of units of collective investment schemes (article 59 (3) FinIO), subject to a cap at CHF 20 million (article 59 (1) FinIO).

e) Specific Requirements for Securities Firms

Securities firms remain fundamentally subject to the current regime, including in terms of consolidated supervision. They are subject to full capital adequacy, liquidity and risk diversification requirements imposed by Basel III at entity and on a consolidated basis (article 46 (1) and (3) FinIA), unless they do not maintain settlement accounts for their clients (article. 70 (4) FinIO). The flip-side of this regime is the possibility offered to securities firms to rely, like banks, on additional capital instruments to prevent or overcome a situation of financial distress (article 47 FinIA and article 13 (1) Banking Act). This being said, the FinIA introduces some novelties. For example, securities houses will be authorized to accept public deposits in connection with its regulated activities (article 44 (2) FinIA) and credit such deposits to interest-bearing accounts. This regulatory framework falls, however, short from an English-style client-money protection regime, although the FinIA mandates the Federal Council to issue provisions on the use of public deposits (article 44 (3) FinIA).

f) Specific Requirements for Branches and Representation Offices of Foreign Financial Institutions

Finally, the regime for branches and representation offices of foreign financial institutions is closely mirrored on the current regime for foreign banks and securities dealers. In this respect, the greatest novelty is the new scope of this regime which will also apply to foreign portfolio managers and trustees as well as well as managers of collective assets that were unregulated until now. As a consequence, foreign groups with a local presence in Switzerland may need to reconsider their business model if they effectively carry out activities in Switzerland, including mere marketing activities, since they would trigger licensing requirements.

4) Dual Supervision of Portfolio Managers and Trustees

The most important change introduced by the FinIA is the prudential supervision of portfolio managers and trustees under a two-tiered supervisory approach, where the supervisory responsibility will be shared between FINMA and supervisory organizations, a new hybrid supervisor, which will be responsible to supervise portfolio managers and trustees under the FinIA as well as trade assayers under the Federal Act on the Control of the Trade in Precious Metals and Precious Metal Articles of 20 June 1933 (SR 941.31) and be licensed and supervised by FINMA (article 43*a* (2) FINMASA). Supervisory organizations will also be allowed to act as a self-regulatory organization under the Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 provided it was recognized as such (article 43*a* (3) FINMASA).

Under this model, FINMA will license and supervise portfolio managers and trustees (article 5 (1) and 61 (1) FinIA). However, portfolio managers and trustees will be required to join a supervisory organization (article 7 (2) FinIA), which will be responsible

for the day-to-day supervision (article 61 (2) FinIA and article 43*b* (1) FINMASA). As an exception to this rule, portfolio managers and trustees belonging to a group that is subject to consolidated supervision will not be required to join a supervisory organization, but will be supervised directly by FINMA as part of the consolidated supervision. The supervisory organizations will be entitled to rely on audit firms to inspect portfolio managers and trustees following the dual-supervisory model applied by FINMA or carry out the inspection themselves, as some self-regulatory organizations already do in the realm of anti-money laundering regulations (article 62 (1) FinIA and article 43*k* (1) FINMASA).

Under normal circumstances, the supervisory organization will be responsible for the day-to-day supervision (article 43*b* (1) FINMASA), while FINMA will stay in the background. This supervision will be exercised mainly through periodic regulatory audits. Furthermore, portfolio managers and trustees will be required to respond to any request for information that the supervisory organization requires to carry out its statutory duties and to inform the supervisory organization of the occurrence of any event that is of material importance for the supervision (article 43*l* (1) and (2) FINMASA).

The supervisory organization will not have formal administrative powers, however. This role will remain with FINMA, who will be in charge of licensing (article 5 (1) FinIA) and taking formal enforcement action against portfolio managers and trustees (as with any other supervised entity). If, in the course of their supervision, a supervisory organization finds that an portfolio manager or a trustee breached its obligation, it will be required to set a deadline to the regulated entity to remedy the situation and if it fails to act within the deadline, it will be required to report the matter to FINMA (article 43*b* (2) FINMASA). FINMA will then take over the case and will be empowered to use the full palette of administrative measures available to it, including issuing a declaratory ruling (article 32 FINMASA), ordering remedial measures (article 31 FINMASA), prohibiting a person from exercising a controlling function within a supervised entity (article 33 FINMASA), naming and shaming (article 34 FINMASA), confiscating undue profits (article 35 FINMASA), appointing an investigating agent to clarify the facts or manage the institution (article 36 FINMASA) or even withdraw the license (article 37 FINMASA).

The split between supervisory organizations and FINMA will, however, need to be clarified in practice. Indeed, the line between supervision and enforcement is not clear. It is, therefore, likely that FINMA will create a halfway house to deal with entities that need to be monitored closely although their actions would not justify taking formal enforcement proceedings, as it already does in connection with banks and securities dealers that are subject to so-called intensive supervision.

Similarly, further clarifications will be needed to define the threshold for FINMA to take enforcement action. Although the FinIA suggests that FINMA will be required to take enforcement action only against characterized offenders who failed to

remedy breaches after the deadline set forth by the supervisory authority (*see* article 43*b* (2) FINMASA), it seems unlikely that FINMA can turn a blind eye to serious breaches. In such cases, it is likely to need to take action, and issue blame or take other enforcement action (*e.g.,* confiscate undue profits) without giving the entity the chance to clean up.

5) Other Changes

The FinIA also amends a number of other acts. The main changes relate to the CISA. These amendments are related, on the one hand, to the new regulatory framework which regulates institutions, such as managers for collective assets and fund management companies in the FinIA, rather than in the CISA. However, the FinIA amends the CISA in a more substantial manner. First, the status of distributors of collective investment schemes will be repealed and, where applicable, replaced by the obligation to register client advisors under the FinSA. Furthermore, it amends the regime for offering foreign collective investments schemes. First, it substitutes the concept of distribution of collective investment schemes with the concept of "offering" borrowed from the FinSA and – in our view without any statutory basis – an extensive construction of the financial service of buying and selling financial instruments for clients to include any activity aimed at enticing an end-client to buy or sell a security (including possibly through another financial service provider). Second, it limits the scope of the obligation to appoint a Swiss representative and paying agent to funds offered to high net worth individuals who elected to be treated as qualified investors and thus releases collective investments schemes that are exclusively offered to other qualified investors from the scope of the CISA. Finally, the FinIA removed offerings 'from Switzerland' from the scope of the investments on collective schemes (articles 120 (1) and 123 (1) CISA as amended by the FinIA). In doing so, the FinIA arguably removed pure outbound offerings of collective investment schemes from the scope of the CISA, which is likely to significantly decrease the regulatory burden of collective investment schemes that are managed or administered in Switzerland without being offered locally.

In the realm of anti-money laundering, the FinIA entails two important changes. First, portfolio managers, trustees and trade assayers will be subject to the same regulatory regime as banks and securities dealers. Instead of having the possibility to join an SRO, compliance with the Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (SR 955.0) will be supervised as part of the overall prudential supervision, albeit following the dual supervisory model, with the supervisory organization in charge of ongoing supervision and FINMA intervening on a more ad hoc basis, with the sole power to grant license and take formal enforcement action. Second, the current regime of directly supervised financial intermediaries will be repealed and financial intermediaries that are not already supervised by FINMA as part of the overall prudential supervision will have to join a self-regulatory organization.

Among other further amendments, the FinIA also introduces a licensing obligation for trade assayers who deal in bankable precious metals, which is based on the same model as the one applicable to portfolio managers and trustees.

6) Phasing-in

As mentioned at the outset, the FinIA will enter into force on 1 January 2020. The FinIA provides for a generous phasing in process: financial institutions that were previously supervised by FINMA, such as asset managers for collective investment schemes and fund management companies under CISA as well as securities dealers under SESTA, will be automatically grandfathered into their new status under the FinIA (article 74 (1) FinIA), but will need to join an ombuds organization within six months of the recognition of the first ombuds organization by the Federal Department of Finance (article 93 (2) FinIO).

Trustees, portfolio managers and managers of collective assets that are newly subject to licensing requirements will need to report themselves to FINMA within six months of the entry in force of the FinIA and will have three years to submit their licensing application, provided they are already member of a self-regulatory organization under the AMLA (article 74 (2) FinIA). Otherwise, they will need to report themselves within six months and have joined an SRO within a year of the entry in force of the FinIA, unless they joined a supervisory organisation and filed their application with FINMA in the meanwhile (article 92 (1), although there is no certainty that the supervisory organizations will be up and running by then.

Furthermore, during the first year following the entry in force of the FinIA, new asset managers and trustees will be entitled to commence their operations provided that they immediately notify FINMA and comply with all requirements under the FinIA, with the exception of joining a supervisory organization. They will then have a year counting from the first licensing of a supervisory authority by FINMA to file their own application to be licensed and join a supervisory authority, provided they joined a self-regulatory organization under the AMLA (article 74 (3) FinIA).

The phasing-in rules under the FinIA are, thus, not entirely congruent with the rules of the FinSA which provides for a two-year phasing-in period to comply with the client segmentation, rules of conduct and organizational duties. This change is all the more paradoxical insofar as it extends the current obligation to appoint a Swiss representative and paying agent in connection with the offering of foreign collective investment schemes that are not approved by FINMA for as long as the a financial service provider that did not make the switch to the new rules of conduct and organization rules of the FinSA is involved in the process (*see* article 105 (3)(e) and article 106 (3)(e) FinSO).

7) Conclusion

In conclusion, the FinIA will do more than create a regulatory framework for portfolio managers and trustees. It creates a comprehensive framework for the supervision of financial institutions, with the notable exception of banks and insurance companies. As such, it is on the one hand a recast of existing rules. On the other hand, by codifying the existing practice in a systematic manner, it will necessarily lead to changes in the applicable regulatory framework. The FinIO fine-tuned a number of governance requirements to ensure that the rules remain proportionate. However, it will be necessary to see how FINMA applies the new rules to determine whether they indeed are able to create a level playing field among financial service providers without falling in the trap of one size fits all financial institutions.

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Supervision of Portfolio Managers and Trustees

Reference: CapLaw-2019-58

Under the new Financial Institutions Act (FinIA) entering into force on 1 January 2020, portfolio managers and trustees will have to apply for a license with the Swiss Financial Market Supervisory Authority (FINMA) and become subject to ongoing prudential supervision by new supervisory organizations (SO). After the Swiss parliament passed the new legislation in June 2018, the Swiss Federal Department of Finance (FDF) released its draft implementing ordinance (Draft-FinIO) for consultation in October 2018. On 6 November 2019, the Federal Council adopted the final version of the Financial Institutions Ordinance (FinIO) as well as the implementing ordinance to the new Financial Services Act, and set the entry into force of the new regulation for 1 January 2020. The final FinIO contains various relevant changes for portfolio managers and trustees compared to the Draft-FinIO. Against the background of the imminent entering into force of the new legislation, the purpose of this article is to provide a summary of the license requirements for portfolio managers and trustees as well as the applicable transitional periods.

By Patrick Schleiffer / Ramona von Riedmatten

1) Portfolio Managers and Trustees will be FINMA-licensed Entities

While the new FinIA will only bring limited changes to the regulatory landscape within which the already licensed Swiss financial institutions operate, the changes with respect to portfolio managers and trustees will be substantial. These previously unlicensed businesses will have to apply for a license with the Swiss regulator FINMA, and they will be subject to comprehensive licensing requirements. In addition, under the new law and regulations these businesses will be subject to ongoing prudential supervision by the yet to be established SO. Thus, the FinIA (and its implementing ordinance)

will, for the first time, subject portfolio managers and trustees to license requirements and an ongoing prudential supervision. As a result, portfolio managers and trustees will generally be subject to the same type of rules that also apply to other financial institutions. Needless to say that this new regulatory framework is significantly different than the situation under current law, where these types of financial intermediaries were only required to register themselves with a self-regulatory organization (SRO) for purposes of compliance with the Swiss anti-money laundering laws.

a) Scope of the New Rules

The FinIA defines portfolio managers as someone that, based on a mandate agreement, can dispose of a client's assets by way of the following activities: (i) purchase or sale of financial instruments, (ii) acceptance and transmission of client orders relating to financial instruments, (iii) management of financial instruments (asset management), or (iv) advice relating to financial instruments (investment advice). A portfolio manager has to deposit its clients' assets segregated per client with a Swiss bank, a Swiss securities firm, or with an institution outside Switzerland, provided such institution is subject to an equivalent prudential supervision.

A trustee is defined under the FinIA as someone that based on a trust deed can dispose of the assets of a trust within the meaning of the Hague Trust Convention. This rather specific definition excludes other trust-related service providers, such as protectors, from the scope of application of the new licensing requirements. Also, persons providing similar types of services (*e.g.*, nominee directors) will not be covered by the new rules.

The FinIA and the FinIO provide for certain exemptions with respect to the activity as portfolio manager or trustee. In particular, there will be exemptions for persons managing the assets of persons with whom they have "economic" or "family" ties. In this respect, the FinIO further specifies what is considered as "economic" or "family" ties (including a list of the relevant family relationships). Such exemptions allow, for example, single family offices to continue to operate without the need for a license. Multi-family offices can, however, generally not benefit from this exemption as they manage assets of a number of unrelated clients. Further, the FinIA and the FinIO also exclude from the licensing requirements persons that are acting based on a statutory mandate (*e.g.*, guardians).

Further, no license is required where financial services or trustee services are provided exclusively to companies/entities within the same group of companies. Lastly, under the final FinIO, unlike under the Draft-FinIO, FINMA may exempt trustees, at their request, from obtaining a trustee license, if the trustee (i) is a trust company owned and supervised by a trustee that holds an authorisation from FINMA to act as trustee, and (ii) only acts as trustee of trusts which have been created by the same person or have

been established for the benefit of the same family. This exemption covers the so-called "dedicated trust companies".

In addition, in order to fall within the scope of the new rules, the activities of a portfolio manager and a trustee, respectively, have to be undertaken on a commercial basis. According to the FinIO, an activity is considered to be undertaken on a commercial basis if any of the following thresholds are exceeded: (i) annual gross earnings in excess of CHF 50,000, (ii) having relationships with more than 20 contractual counterparties in a calendar year, or (iii) assets under management/assets under trust in excess of CHF 5 million. These thresholds largely follow the rules already set out today in the current Swiss Anti-Money Laundering Ordinance and accordingly, as a rule of thumb, portfolio managers that are currently subject to the Swiss anti-money laundering obligations will also be subject to the licensing requirements under the FinIA and FinIO. However, the criterion that trustees and portfolio managers who execute transactions with an aggregate value of over CHF 2 million per year are acting on a professional basis, which was included in the Draft-FinIO (and which also had a corresponding model in the Anti-Money Laundering Ordinance), no longer appears in the FinIO. The revised, more narrow, definition of acting on a "professional basis" may in practice be relevant for private trust companies.

b) License Requirements

As a financial institution, a portfolio manager or a trustee has to meet the general licensing requirements applicable to all types of financial institutions as well as specific requirements applicable to portfolio managers and trustees. Among the general requirements are such things as (i) the requirement to manage the relevant company from Switzerland, (ii) "fit and proper" requirements with respect to the board of directors, senior management and qualified participants (*i.e.*, each direct or indirect holding of 10 % or more of the voting rights or the capital), (iii) duty to notify FINMA of activities outside Switzerland, and (iv) the requirement to be affiliated with a mediation body.

Non-Swiss portfolio managers rendering their services on a pure cross-border (*i.e.,* without permanently employing staff in Switzerland) to clients in Switzerland, will not need a license from FINMA. However, they will have to comply with the regulatory rules under the new Financial Services Act (FinSA). When providing financial services on a pure cross-border basis, the staff of non-Swiss portfolio managers (so-called client advisers) will further have to register in a new register of advisers in Switzerland and be obliged to meet the requirements for being registered (including having the necessary know how and skills to comply with the regulatory rules under the FinSA and being affiliated to an ombudsman in Switzerland) before providing financial services in Switzerland, unless the relevant non-Swiss financial service provider is subject to prudential supervision outside of Switzerland and its client advisors provide services in Switzerland exclusively to professional and institutional clients.

In terms of specific requirements, the following applies to portfolio managers and trustees:

– Affiliation with a supervisory organization:

Portfolio managers and trustees will have to apply for affiliation with one of the new SO (see section 2 below) which will be responsible for the day-to-day prudential supervision of the portfolio managers and trustees. The FinIO specifies that a portfolio manager or a trustee has a right to be affiliated to an SO (*i.e.*, the SO has to accept the application for affiliation) if such portfolio manager and trustee has put in place internal regulations and an organization of its business that ensures compliance with the regulatory requirements (including those set out in the FinSA and those under the Swiss anti-money laundering laws, in each case to the extent applicable). In addition, the final FinIO states that the SO may make the affiliation dependent on portfolio managers and trustees being subject to a special professional secrecy.

– Composition of the management:

Unlike other financial institutions (such as banks or securities firms), portfolio managers and trustees are not required to set up a two-tiered management structure. FINMA may, however, on a case-by-case basis require certain portfolio managers and trustees to put in place a two-tiered management structure with a board of directors (composed mostly of directors who are not part of the executive management) and an executive management. According to the FinIO, portfolio managers and trustees may become subject to such additional FINMA requirements if they have ten or more employees (full time) or annual gross earnings of at least CHF 5 million, and if required in light of the type and nature of their business. If a portfolio manager or trustee is able to establish that the proper continuation of the business is ensured with one qualified manager only, the two-tiered management structure cannot be imposed by FINMA.

As a rule, the management of a portfolio manager or a trustee must be composed of at least two qualified individuals. An individual is qualified within the meaning of the FinIA if such individual has an adequate education and sufficient professional experience when taking over the management of a portfolio manager or a trustee. The FinIO further specifies the requirements in terms of education and professional experience. While the Draft-FinIO was much criticized in this respect, as it required that qualified managers had the same level of experience and qualifications as auditors that effect audits of trustees, the final version of the FinIO contains a different and clearer test. According to the FinIO, the requirements concerning education and professional experience are as follows (with FINMA having the power to grant exemptions on a case-by-case basis):

- professional experience of at least 5 years;
- relevant training in the area of portfolio management or trust matters of at least 40 hours; and
- obligation for ongoing training.

In line with European regulations, the FinIO also requires portfolio managers and trustees to set in place appropriate business continuity procedures in case of a prolonged absence or death of a qualified individual.

– Risk management, internal controls and compliance

A portfolio manager or a trustee will have to implement an adequate risk management and effective internal controls, including a compliance function. As a rule, risk management and compliance functions have to be independent from the business side.

Taking into account that internal control systems and compliance can be quite a burden for smaller companies, the FinIO provides for certain exemptions. More specifically, a portfolio manager or trustee does not need to have a risk management and compliance function that is independent from the business, if it:

- has annual gross earnings of less than CHF 2 million or no more than 5 employees (full time); and
- pursues a business model without increased risks.

On the other hand, where a portfolio manager or a trustee has a board of directors composed mostly of directors who are not part of the executive management and annual gross earnings of more than CHF 10 million, FINMA may require such portfolio manager or trustee to put in place an independent internal audit.

The risk management and compliance functions may be delegated to qualified third parties. Such delegation will be subject to the general delegation rules applicable to all financial institutions, including the requirements to have the necessary technical know-how and internal procedures to adequately supervise the delegated functions and to document the delegation in the portfolio manager's or trustee's organization documents.

– Minimum capital requirements:

Portfolio managers and trustees will be required to have a minimum capital of CHF 100,000. In addition, they need to maintain additional equity in an amount equal to one quarter of their fix costs, but no more than CHF 10,000,000. The FinIO further specifies the requirement for additional equity as follows:

- The following qualifies as fix costs: (i) salaries (not including discretionary and/or performance-based bonus payments), (ii) operational costs, (iii) amortization of immovable property, and (iv) costs of valuation adjustments, provisions and losses.

- When calculating the additional capital, companies can take into account the following: (i) fully paid up capital, (ii) legal and other reserves, (iii) undistributed profits, (iv) certain latent/hidden reserves, and (v) certain subordinated loans (provided they have a minimum term of at least 5 years).

- On the other hand, when calculating whether the additional equity requirement is met, companies need to deduct (i) losses of the period and losses carried forward, (ii) goodwill, (iii) book value of participations, (iv) 20% of any subordinated loans during the 5 years preceding the reimbursement, and (v) certain other values as further set out in the FinIO.

- Finally, the FinIO states that a professional liability insurance can cover up to 50% of the additional equity requirement.

2) Supervisory Organizations

Under the FinIA, one or more FINMA-licensed privately organized SO will be responsible for the ongoing day-to-day supervision of portfolio managers and trustees. In terms of timing, the license applications for the new SO have to be filed with FINMA within six months of the entry into force of the FinIA (*i.e.,* by end of June 2020) and FINMA will then have to decide on the license applications by the end of 2020.

Once operational, the SO will be responsible for the ongoing day-to-day prudential supervision of portfolio managers and trustees. As part of this supervision, an SO may conduct audits of portfolio managers and trustees themselves or they can require the portfolio managers and trustees to appoint an external auditor for purposes of the regulatory audit. This rule allows existing SROs with their own audit organization to continue to conduct their own audits (should such SRO decide to apply for a license as SO).

The SO will also have the possibility to reduce the audit frequency of the portfolio managers and trustees supervised by them. This risk-based approach allows smaller entities to benefit from a reduced supervisory burden. In years where there is no audit, the supervised entities will have to prepare and file a (standardized) report on their compliance with the relevant laws and regulations. FINMA will issue further regulatory guidance on the risk-based approach and the requirements for the standardized report.

As mentioned above, the SO will be responsible for the ongoing day-to-day prudential supervision of portfolio managers and trustees. Should an SO learn that a portfolio

manager or a trustee does not comply with its obligations, it can set a deadline within which the respective portfolio manager or trustee has to remedy the situation. Other than that and a general right to obtain information from the supervised entities, the SO do not have any other supervisory or enforcement tools at their disposal. In particular, the SO will not be able to open their own enforcement action. Accordingly, if a supervised entity does not comply with its duties, the SO will have to notify FINMA who will then take up appropriate enforcement actions.

In order to avoid duplication of audit work and in order to ensure a harmonized supervision, it is expected that FINMA and the SO will issue further implementing regulations and that FINMA and the SO will coordinate their supervision work.

3) Transitional Period

Taking into account the amount of changes that the new regulatory framework brings to existing portfolio managers and trustees, the FinIA and the FinIO provide for rather long transitional periods. The transitional periods can be grouped in the following three different scenarios:

– Portfolio managers/trustees that are already operating at the time the FinIA enters into force (*i.e.*, activities started before 1 January 2020):

Existing portfolio managers and trustees have to notify FINMA within 6 months of the entry into force of the FinIA, *i.e.*, until 30 June 2020. Following this initial notification, such existing portfolio managers and trustees have to meet the license requirements and file a license application with FINMA within 3 years after the entry into force of the FinIA, *i.e.*, until the end of 2022. Once a license application has been filed, such portfolio managers and trustees can continue their activities until FINMA has decided on the license application; provided, however, such portfolio managers and trustees are affiliated with an SRO for AML purposes.

– Portfolio managers/trustees that start their activities after 1 January 2020 but before the end of 2020:

These portfolio managers and trustees have to immediately notify FINMA of their activities and they have to generally comply with the FinIA licensing requirements from day one. The only exception is the requirement to be affiliated with an SO. For this obligation, the FinIA provides for a transitional period of one year following the point in time FINMA has authorized the first SO. At the same time, these type of portfolio managers and trustees also have to file a license application with FINMA. As is the case with the existing portfolio managers and trustees, once a license application has been filed, such portfolio managers and trustees can continue their activities until FINMA has decided on the license application; provided, however, such portfolio managers and trustees are affiliated with an SRO for AML purposes.

– Portfolio managers and trustees that start their activities after 1 January 2021:

All other portfolio managers and trustees, i.e. all that start their activities after 1 January 2021, first have to apply for a license and an affiliation with a SO. They may only start operating their business once FINMA has decided on the license application.

4) Conclusion

The FinIA provides for a number of significant changes to the regulatory framework within which portfolio managers and trustees will have to operate in the future. Most importantly, portfolio managers and trustees will be subject to stringent licensing requirements and ongoing supervision by yet to be established SO. However, the FinIO takes into account that many of the existing portfolio managers and trustees are smaller businesses with a lean management structure and accordingly, the implementing rules and regulations as currently provided for in the FinIO do provide certain regulatory flexibility. Furthermore, the transitional periods provided for in the FinIA allow for a gradual transition of existing portfolio managers and trustees into the new regulatory regime. It can however not be excluded that the custodian banks with which a portfolio manager deposits the assets of its clients will urge such portfolio manager to obtain the relevant license as soon as reasonably possible as the regulatory duties of a custodian bank towards a prudentially supervised portfolio manager will be less demanding than those in respect of a non-supervised portfolio manager during the transitional period.

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Sunrise terminates SPA with Liberty Global

Reference: CapLaw-2019-59

On 13 November 2019, Sunrise Communications Group AG announced that it had canceled the share purchase agreement with Liberty Global in connection with its proposed acquisition of UPC Switzerland.

CRISPR Therapeutics AG public offering of an aggregate 4,887,500 common shares

Reference: CapLaw-2019-60

On 20 November 2019, CRISPR Therapeutics AG launched its public offering of an aggregate 4,887,500 common shares on Nasdaq raising approximately USD 315.2 million. CRISPR Therapeutics is a leading gene editing company based in Zug, Switzerland, focusing on developing transformative gene-based medicines for serious diseases based on its proprietary CRISPR/Cas9 technology.

Jacobs Holding completes the placement of Barry Callebaut Shares

Reference: CapLaw-2019-61

Jacobs Holding AG successfully placed 550,000 shares (approx. 10%) in Barry Callebaut AG by way of an accelerated bookbuilding process and a simultaneous private placement. Jacobs Holding thus diversified its portfolio while remaining Barry Callebaut's reference shareholder with a stake of approximately 40%. Jacobs Holding is an investment company founded by entrepreneur Klaus J. Jacobs. The only economic beneficiary of Jacobs Holding is the Jacobs Foundation, one of the world's leading charitable foundations for the promotion of development opportunities for children and young people.

Canton of Geneva issued a Green Bond

Reference: CapLaw-2019-62

On 28 November 2019 the Canton of Geneva issued green bonds listed on the SIX Swiss Exchange in an aggregate amount of CHF 660 million. The issuance was made according to the Green Bond Principles published by the International Capital Market Association, and divided into three respective tranches of CHF 175 million with a maturity in 2028, CHF 200 million with a maturity in 2039 and CHF 285 million with a maturity in 2032.

WisdomTree Issuer X Limited launched one of the world's first crypto index ETP listed on a regulated stock exchange

Reference: CapLaw-2019-63

On 3 December 2019, WisdomTree Issuer X Limited was recognized by the SIX Swiss Exchange as a new Exchange Traded Product (ETP) issuer to its trading segment and, launched one of the world's first crypto index ETP listed on a regulated stock exchange. The ETP is investing in Bitcoin.

Kuros Biosciences completes rights offering

Reference: CapLaw-2019-64

On 6 December 2019, Kuros Biosciences, a life science company focusing on the development and marketing of orthobiologics, completed a capital increase by way of a rights offering to its shareholders. 36.3% of the shareholders of Kuros Biosciences exercised their subscription rights in the rights offering. 2,818,718 of the remaining shares not subscribed were preferably allocated to Optiverder B.V. and further remaining shares were placed in the market. The offer price was set at CHF 1.95 per share.

SCHMOLZ + BICKENBACH AG launches its rights offering

Reference: CapLaw-2019-65

SCHMOLZ + BICKENBACH's rights offering that launched on 10 December 2019. On 2 December 2019, the extraordinary shareholders' meeting of SCHMOLZ + BICKENBACH approved a capital increase of at least CHF 325 million through the issuance of up to 2,953,125,000 new registered shares, and a simultaneous reduction of the nominal value of the existing registered shares from CHF 0.50 per share to the level of the offer price, which is expected to be one of CHF 0.20, CHF 0.25 or CHF 0.30 per new share. The gross proceeds from the capital increase are envisaged to be at least CHF 325 million. The listing and first day of trading of the new registered shares on SIX Swiss Exchange are expected to take place on 9 January 2020.

SCHMOLZ + BICKENBACH, with more than 10,000 employees and its own production and distribution companies in 30 countries on 5 continents, is one of the world's leading providers of individual solutions in the special long steel products sector.

Seminar: 17th Annual Zurich Stock Corporation Conference (17. Zürcher Aktienrechtstagung)

3 March 2020, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event.aspx?WPParams=43A9B2A7C6D4E0E8AAB08D92A7929F

Seminar: 10th Annual Zurich Conference on Responsibility in Corporate Law (10. Zürcher Tagung zur Verantwortlichkeit im Unternehmensrecht)

11 February 2020, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event.aspx?WPParams=43A9B2A7C6D4E0E8AAB08D92A7929E

Vortragsreihe am Mittag: Corporate Responsibility: Why the Stakeholder Model is Doomed to Fail and how Good Corporations Should Behave

28 February 2020, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event.aspx?WPParams=43A9B2A7C6D4E0E8AAB08D92A792A6